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British Columbia

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Report on

The Court Order Interest Act

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE COURT ORDER INTEREST ACT

LRC 90

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TABLE OF CONTENTS

	Page
I Introduction	
A. What is Court Order Interest?	9
B. The *Court Order Interest Act*: An Overview	9
C. Why Examine the *Court Order Interest Act*?	9
D. A Note on the Recommendations	11
	12
II A Discretion to Withhold Interest	
A. Introduction	13
B. A General Discretion to Refuse Prejudgment Interest	13
1. Legislation in Other Jurisdictions	13
2. The Judicial Exercise of a General Discretion	13
(a) Canada	15
(i) Conduct of the Action	15
(ii) Delay	15
(iii) The Need to Assess or Quantify the Claim	16
(b) England	17
(c) Australia	18
3. Arguments for and Against a General Discretion	19
4. Conclusions Respecting a General Discretion to Refuse an Award of Prejudgment Interest	19
	21
III Fixing the Rate of Interest	
A. Introduction	23
B. The Current Law	23
C. An Evaluation of the Current Law	23
D. Conclusions	26
E. Fixing the Rate of Interest	26
1. Introduction	26
2. A Fluctuating Rate of Interest?	26
3. The Rate of Prejudgment Interest	27
4. Comparing Various Rates of Interest	27
5. A Rate Not Compared	28
6. Determining the Appropriate Rates	29
F. Should Prejudgment Interest be Compounded?	29
	31
IV The Running of Time	
A. Introduction	33
B. The Running of Prejudgment Interest on Damages	33
	33
V The Temporal Apportionment of Loss	
A. Introduction	37
B. Apportionment and the Practice of Discounting	37
C. The Temporal Apportionment of Loss in British Columbia	38
1. The Structure of the *Court Order Interest Act*	39
2. Temporal Apportionment in the Courts	39
(a) Introduction	39
(b) Non-Pecuniary Loss	39
(c) Pecuniary Loss other than "Income"	40
(i) Money Expended Before Trial	40
(ii) Money to be Expended After Trial	40
(d) Lost Income	41
(i) Introduction	42
(ii) Judicial Approaches to Lost Income	42
	43

TABLE OF CONTENTS—*Continued*

	PAGE
(e) Damages for Wrongful Dismissal	44
(f) Loss of Support: Fatal Accident Cases	45
3. Recent Developments	48
D. Reform	49
1. Pecuniary Loss	49
2. Non-Pecuniary Loss	50
VI "Special Damages"	52
A. Introduction	52
B. The Meaning of "Special Damages"	52
C. The Six Month Period	54
VII Further Thoughts on Temporal Apportionment and Allocation	56
A. Introduction	56
B. The Response to the Working Paper	56
C. Our Comments and Conclusions	57
VIII Inflation and Court Order Interest	61
A. Introduction	61
B. The British Columbia Law	61
C. Is Reform Required?	63
D. Options for Reform	63
1. Award No Prejudgment Interest on Non-Pecuniary Loss	63
2. Award the Real Rate of Interest	64
IX The Scope of the Act	65
A. The Concept of a Pecuniary Judgment	65
B. Declaratory Orders	65
C. Costs	66
1. Taxation under the *Legal Profession Act*	66
2. Litigation Costs	67
D. Statutory Exclusions	67
1. Introduction	67
2. Exclusions	68
(a) Agreements Respecting Interest	68
(b) Waiver in Writing	68
(c) Statutory Interest	68
E. Recommendations	68
X Who Should Award Prejudgment Interest?	70
A. Introduction	70
B. The Court of Appeal	70
1. Generally	70
2. Appeals from the Dismissal of an Action at Trial	71
3. The Judgment at Trial is Affirmed, and the Appeal is Dismissed	72
4. The Order Made at Trial is Varied	72
C. The Registrar and the Master	73

TABLE OF CONTENTS—*Continued*

PAGE

XI Prejudgment Interest and the Legal Process 75
A. Introduction 75
B. Payment in Full 75
1. Tender 75
2. Acceptance of Tender 75
3. Conclusion 76
C. Payment into Court 77
1. Introduction 77
2. The Current Law 78
3. An Evaluation of the Current Law 80
4. Payment into Court and Consequences for Prejudgment Interest 81
D. Offers to Settle 81
E. Pre-Trial Attachment of Debts 82

XII Post-Judgment Interest 84
A. Introduction 84
B. An Evaluation of the Amendments to the *Court Order Interest Act* Respecting Post-Judgment Interest 85
C. Reconciling Pre and Post-Judgment Interest 86
D. Should the Payment of Post-Judgment Interest be Affected by an Agreement about Interest? 87
E. A Subsidiary Issue 89

XIII Calculating Judgment Interest: the Multiplier Scheme 90
A. Introduction 90
B. Preparation of the Table of Multipliers 91
C. Use of the Tables 91
1. Introduction 91
2. Choosing the Appropriate Multiplier 94
3. Some Examples 94
D. Post-Judgment Interest and the Multiplier Scheme 95
1. Introduction 95
E. Contractual Interest and the Multiplier Scheme 95
F. Availability of the Tables 95
G. Recommendations 96

XIV The Multiplier Scheme: Dealing With Part Payments 97
A. Introduction 97
B. Interim Payments 97
1. Voluntary Payments 97
2. No-fault Benefits 98
3. Conclusions 99
(a) Declining Balance Principle 99
(b) No-fault Benefits 100
(i) Benefits Actually Received 100
(ii) Benefits not Received 100
(iii) Benefits Relating to Future Loss 101
(c) Appropriation 101

TABLE OF CONTENTS—*Continued*

PAGE

C. Interim Payments and the Multiplier Scheme 102
1. The Procedure 102
2. The Examples 102
3. Recommendation 104
D. Part Payment on a Judgment 104
1. Credit for Part Payment 104
2. Examples 104
3. Recommendation 105

XV Application and Transition 106
A. Introduction 106
B. Our General Conclusion 106
C. Special Transition Issues 107
1. Tender Before Judgment 107
2. Payments into Court 108
3. Interest on "Funds" 108
4. "Pecuniary Judgment" 108
D. Post-judgment Interest 109
1. Coming into Force 109
2. Existing Judgments 109

XVI Conclusion 110
A. Generally 110
B. List of Recommendations 110
C. Acknowledgments 115

Appendices 116
A. *Court Order Interest Act* 116
B. The Commission's Prior Work 118
C. Developments in Other Jurisdictions 123
D. The Analysis in *Killeen* v. *Kline* 125
E. The Multiplier Scheme and a Complicated Personal Injury Case 127
F. Additional Multiplier Tables 133
G. *Uniform Judgment Interest Act* and Analysis 135

To The Honourable Brian R.D. Smith, Q.C.,
Attorney General of the Province
of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
THE COURT ORDER INTEREST ACT

In 1973 the Law Reform Commission made recommendations for legislation to provide for prejudgment interest. These were implemented in the following year by what is now called the *Court Order Interest Act*. Much has happened since that time.

Twelve years of experience and jurisprudence has highlighted areas of difficulty. The nature of civil litigation has changed dramatically. The times of recent economic upheaval have led to a sharpened perception of economic issues such as the relationship between interest and inflation rates and problems arising from their volatility. A much more sophisticated understanding of the economic role of prejudgment interest has emerged.

A pioneering piece of legislation when it was enacted, the *Court Order Interest Act* has been rapidly overtaken by events. This Report takes a fresh look at judgment interest and a number of recommendations are made aimed at simplifying and rationalizing this area of the law.

CHAPTER I

INTRODUCTION

A. What is Court Order Interest?

Under our system of civil justice there is no procedure by which an aggrieved person can obtain instant compensation from an unwilling defendant. Each party must present his case to a court and a proper opportunity to prepare it and to discover the nature of his opponent's case is necessary. All this takes time even when the justice system operates efficiently.

The plaintiff with a valid claim is legitimately concerned about being kept out of his money between the time his claim arose and the time a court finally pronounces on it. In many cases the defendant will have control of the money and will earn interest on it. Where the defendant does not have the money, he is saved the expense of borrowing funds to satisfy the plaintiff's claim. At the same time the plaintiff will not have the money in issue. He cannot use it for his own purposes; he cannot invest the money in order to hedge against any decline in its purchasing power due to inflation. He may be obliged to replace the money he claims with borrowed funds on which he must pay interest.

A great injustice is visited on the plaintiff unless he is compensated for the harmful effects of delay. Interest is generally regarded as the appropriate measure of such compensation. There was, however, a traditional common law bias against awarding interest in the absence of an agreement to pay it. The courts were not prepared to create a remedy.

In May 1973, this Commission issued its *Report on Pre-Judgment Interest*.[1] It was recommended that the court be empowered to compensate the plaintiff by adding interest to the judgment he had obtained. This Report was implemented by the *Prejudgment Interest Act* in 1974.[2] In 1979 the title of this Act was changed to the *Court Order Interest Act*.[3]

In enacting the *Prejudgment Interest Act* British Columbia was a pioneer. It was the first jurisdiction in Canada to enact modern prejudgment interest legislation.[4] In the past twelve years a majority of the common law jurisdictions have legislated in this area.

B. The *Court Order Interest Act:* An Overview

The *Court Order Interest Act* is a deceptively simple piece of legislation. In both spirit and detail, but with one important exception, the Act faithfully reflects the recommendations made by the Commission in its 1973 Report. For ease of reference the full text of the Act is set out as Appendix A to this Report. Appendix B to this Report sets out a description of the recommendations made in the 1973 Report and the way in which they were implemented by the Act. That Appendix also describes recommendations made in our other Reports which have touched on prejudgment interest.

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[1] LRC 12. *See* L. Getz, "Pre-Judgment Interest," (1976) 34 Advocate, 25; L. Getz, "More About Pre-Judgment Interest," (1976) 34 Advocate 121. The call for such legislation was voiced in Canada as early as 1901 — S.B. Woods, "Interest as Damages," (1901) 21 C.L.T. 273.

[2] S.B.C. 1974, c. 65.

[3] R.S.B.C. 1979, c. 76. Recent amendments to the *Court Order Interest Act* extend its ambit to post-judgment interest: *Court Order Interest Amendment Act, 1982*, S.B.C. 1982, c. 47. To avoid confusion the term "court order interest" is not used in this Report. The term "prejudgment interest" is used to designate interest payable under the *Court Order Interest Act* in respect of the period preceding judgment, and "post-judgment interest" to designate interest payable in respect of the period after judgment. The term "judgment interest" refers collectively to pre and post-judgment interest. A final point concerns hyphenation. The hyphenated form, "pre-judgment" used in our 1973 Report was not adopted by the legislature in the 1974 Act. "prejudgment" was preferred. The latter convention is followed in this Report except in citing the 1973 Report itself.

[4] Certain other provinces did have legislation respecting prejudgment interest but it tended merely to be a re-enactment of certain 19th Century English legislation which permitted recovery in narrow circumstances only. That legislation was discussed in our 1973 Report.

At the heart of the *Court Order Interest Act* is section 1(1):

> **1.** (1) Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada), from the date on which the cause of action arose to the date of the order.

Several features of this provision should be noted.

First, it directs that "a court *shall* add." The addition of interest is mandatory. The court has no discretion to deny interest to a successful litigant. Moreover, a claim for interest need not be specifically pleaded. Whether the court should have a general discretion to refuse prejudgment interest is discussed in Chapter II of this Report.

What triggers the right to interest is a "pecuniary judgment." The question of what does, and should, constitute a pecuniary judgment is discussed in Chapter IX. In Chapter XI the Report considers whether in all cases it is essential that a claimant have obtained a judgment in order to claim interest.

Section 1(1) gives the court a discretion as to the rate of interest subject to a "floor" equal to the rate of post-judgment interest (currently 5%). The discretion to set the interest rate is discussed in Chapter III. Chapter IV considers the time from which interest should run. Under subsection 1(1) interest runs from the date on which the cause of action arose.

Some kinds of damage will accrue after the main cause of action arose. Section 1(2) provides guidance on the way in which interest should be calculated on such losses:

> (2) Notwithstanding subsection (1), where the order consists in whole or part of special damages, the interest on those damages shall be calculated
>
> (a) on the total of the special damages incurred in the 6 month period immediately following the date on which the cause of action arose;
>
> (b) on the total of the special damages incurred in any subsequent 6 month period,
>
> from the end of each 6 month period in which special damages were incurred to the date of the order.

This provision deals with "special damages." The meaning the courts have given to that term in this context is discussed in Chapter VI as is the 6 month rule for the accrual of special damages. Section 1(3) sets out a special rule for calculating interest on special damages where there has been a relatively short accrual period.

Section 2 of the Act, to which section 1 is subject, limits the power of the courts to award interest:

> **2.** The court shall not award interest under section 1
>
> (a) on that part of an order that represents pecuniary loss arising after the date of the order;
>
> (b) where there is an agreement about interest between the parties;
>
> (c) on interest or on costs; or
>
> (d) where the creditor waives in writing his right to an award of interest.

Clause (a) prohibits an award of interest on pecuniary loss arising after judgment. This virtually compels the court to divide a plaintiff's claim into losses incurred before judgment and those incurred after judgment. The phrase we have adopted to describe this process is the "temporal apportionment" of loss and Chapter V is devoted to the issues surrounding it.

Paragraphs (b) and (d) permit the parties to oust the application of the *Court Order Interest Act* in favour of arrangements which they have reached consensually.

Paragraph (c) prohibits the award of interest on interest. This is generally regarded as a prohibition on the compounding of prejudgment interest. This issue is discussed in Chapter III.

Sections 3, 4 and 5 of the *Court Order Interest Act* concern procedural matters.

In 1982 the *Court Order Interest Act* was amended.[5] The amendments have not yet come into force. The amendments presuppose that certain sections of the *Interest Act* (Canada),[6] which prescribe a rate of post-judgment interest, will be repealed or withdrawn insofar as they have effect in British Columbia. That event would trigger the coming into force of the 1982 amendments.

The subject matter of the 1982 amendments is post-judgment interest. Those amendments are discussed in Chapter X of this Report.

Our interest in this area did not cease in 1973 when we issued our first Report. We have continued to monitor developments in this area, both in the operation of the *Court Order Interest Act* and in law reform activity elsewhere.[7]

C. Why Examine the *Court Order Interest Act*?

On several occasions, submissions were solicited from the judiciary, the bar, and others respecting the Act.[8] In January, 1983, a *Uniform Judgment Interest Act* was settled by the Uniform Law Conference of Canada.[9] This led the Attorney General[10] to request that the Commission undertake a review of the *Court Order Interest Act*.

What occurred has been a happy coincidence of the Attorney General's priorities with our own. We believe that, for a number of reasons, the time is ripe for a re-examination of the *Court Order Interest Act* and many of its fundamental features. When our first prejudgment interest legislation was enacted the focus was not on refinements and nuances in its operation. Rather, the priority was to establish the principle of prejudgment legislation.

Much has happened since the first prejudgment interest legislation was enacted. We now have twelve years of experience under it and a clear picture of the kinds of issues which have given the courts difficulty. We are able to identify areas in which the operation of the Act can be improved. We also have the experience of other jurisdictions. Other Canadian provinces have legislated on prejudgment interest and a number of new ideas have emerged. Moreover, scholars who specialize in law and economics have now started to examine this area and we are gaining a more sophisticated understanding of the economic role of prejudgment interest.

The past few years have also been times of economic upheaval which have thrown into sharp relief issues less clearly perceived thirteen years ago.

---

[5] *Court Order Interest Act Amendment Act*, S.B.C. 1982, c. 47.

[6] R.S.C. 1970, c. I-18.

[7] The developments in other jurisdictions are described in Appendix C to this Report.

[8] (1977) 35 Advocate 341; (1979) 37 Advocate 275.

[9] The question of a Uniform Prejudgment Interest Act was placed on the Conference agenda at the suggestion of the British Columbia Commissioners; *see Proceedings of the Commissioners of the Conference of Uniformity of Law in Canada*, (hereafter "Proceedings") 1975 at 34. At that meeting it was resolved that the British Columbia Commissioners prepare a report for consideration at the 1976 meeting. Consideration of that report was deferred until 1979 (*Proceedings*, 1976 at 32, 1977 at 31, 1978 at 33). At the 1979 meeting, preparation of a further report was referred to the Saskatchewan Commissioners (*Proceedings*, 1979 at 35). Their report was considered at the 1980 meeting (*Proceedings*, 1980 at 32). At that meeting, preparation of a draft Uniform Prejudgment Interest Act was entrusted to the Saskatchewan Commissioners. At the 1981 meeting, consideration of the Saskatchewan draft was again deferred pending consideration of a report by the Manitoba Commissioners incorporating many of the proposals contained in the Manitoba Law Reform Commission's *Report on Prejudgment Compensation on Money Awards: Alternatives to Interest* issued in 1982 (*Proceedings*, 1981 at 32). A final draft of the Uniform Act was not in fact settled until 1982 (Proceedings, 1982 at 32).

The text of the Uniform Act and a comparison of its features with the recommendations made in this Report are to be found at Appendix G.

[10] Then The Honourable Allan Williams, Q.C.

One example is the need for sensitivity to the relationship between interest rates and inflation rates. Another example is the volatility of interest rates. It is no longer realistic to expect a single rate of prejudgment interest to achieve justice except in the most unusual cases.

Finally, the nature of civil litigation has changed dramatically. This is particularly true in reference to the awarding of damages for personal injury, wrongful death, and wrongful dismissal. A "global" award of damages was the norm twelve years ago. Today we see the itemization of such awards and the increasing use of actuarial evidence and of discounting to quantify awards. Moreover, the Insurance Corporation of British Columbia has become a major litigant. Their involvement has led to a larger volume of interim payments and benefits flowing to plaintiffs. These must also be accommodated by a properly functioning prejudgment interest scheme.

It was these considerations that, quite apart from the request by the Attorney General, prompted us to activate this project. All aspects of the operation of the Act were intensively researched and the results embodied in a Working Paper on the *Court Order Interest Act* which was circulated for comment and criticism in April 1985.[11] The response attracted by the Working Paper will be referred to at appropriate points in this Report.

D. A Note on the Recommendations

While this Report sets out recommendations concerning all aspects of the Act, potentially the most far-reaching change is to be found in Chapter XIII. This concerns the manner in which prejudgment interest is calculated and a wholly new scheme is set out. The foundation of this scheme rests on computer generated tables of multipliers, calculated with reference to various economic and mathematical assumptions. In essence, each multiplier in a table represents the present value of $1.00, together with interest from the date to which it relates to the date to which the table is issued. A new table would be generated each month and it would apply to judgments pronounced during that month.

We believe that the use of a table-based scheme, incorporating multipliers to be used in calculating court order interest would considerably simplify practice under the *Court Order Interest Act*. In addition to simplicity for the "end user" a table-based scheme would also permit a much more powerful and realistic set of economic parameters to be used. It would, for example, easily permit the use of interest rates which change as frequently as once each month and it would permit the compounding of court order interest. These refinements pose grave difficulties if one adheres to the conventional methods of calculating interest.

Given the number and character of the changes recommended in this Report, any attempt to frame them in terms of amendments to the existing legislation is more likely to result in confusion rather than clarity. Our first recommendation, therefore, is for the repeal of the existing *Court Order Interest Act* and its replacement with legislation that reflects our other recommendations.

The Commission recommends:

1.(1) The Court Order Interest Act *should be repealed and replaced by legislation (hereafter referred to as "the New Act") which embodies the recommendations made in this Report.*

(2) Subject to those recommendations, the New Act should carry forward the policies of the Court Order Interest Act.

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[11] Law Reform Commission of British Columbia, *The Court Order Interest Act* (W.P. No. 49, 1985), hereafter referred to as "the Working Paper."

CHAPTER II

A DISCRETION TO WITHHOLD INTEREST

A. Introduction

Under the *Court Order Interest Act* the court has no discretion to refuse prejudgment interest. Section 1 uses the peremptory words "a court shall add to a pecuniary judgment an amount of interest. . . appropriate in the circumstances."[1]

A view frequently expressed respecting the operation of the Act is that it would be improved by vesting a greater amount of discretion in the court. In particular it has been suggested that the court be given a general discretion to refuse to add prejudgment interest to an order on the ground of fairness and equity.

The question of what, if any, discretion courts should exercise in awarding prejudgment interest was the most controversial issue considered in our *Report on Prejudgment Interest*. The continuing debate on this issue makes it appropriate to reconsider this issue.

B. A General Discretion to Refuse Prejudgment Interest

1. Legislation in Other Jurisdictions

In some Canadian jurisdictions no prejudgment interest legislation, as such, is in force. In Saskatchewan, for example, prejudgment interest is payable only when the plaintiff brings himself within the fairly stringent terms of legislation modelled on *Lord Tenterden's Act*[2] and incorporated in sections 46 and 47 of the *Queen's Bench Act*. Section 46 provides:[3]

> **46.** Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.

A similar provision was in force, until very recently, in Manitoba and in Alberta.[4]

The reference to cases "in which it has been usual for a jury" to allow prejudgment interest reflects the Ontario origins of this legislation. It was formerly the practice in Ontario for juries to add prejudgment interest in the case of "just debts" which were "improperly withheld." This language has been held to incorporate the Ontario jurisprudence in that regard, and hence to introduce a general discretion in cases falling within the legislation.[5]

Other common law provinces have abandoned *Lord Tenterden's Act* and adopted prejudgment interest schemes which provide for the exercise of a judicial discretion in awarding prejudgment interest. In these jurisdictions interest is *prima facie* recoverable by a successful plaintiff unless the court

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[1] Section 2 of the Act prescribes cases in which no prejudgment interest is to be added in equally specific terms. On occasion, British Columbia courts have lost sight of the absence of any discretion in the Act. For example, in *Air Canada* v. *R. in Right of B.C.*, [1984] 5 W.W.R. 462, 12 D.L.R. (4d) 567 (B.C.S.C.), Macdonald J. at 468 gave serious consideration to an argument that the plaintiff's delay should deprive it of any claim to prejudgment interest. *See also, Christy* v. *Mohl*, [1985] B.C.D. Civ. 207-18 (B.C.S.C.). In *T. March Contracting Ltd.* v. *Silverton Transport Ltd.*, [1984] B.C.D. Civ. 3670-04 (B.C.S.C.), prejudgment interest was ordered paid out of a trust fund only after the claims of all the beneficiaries had been satisfied. *Contra, see Shapiro* v. *Shelley*, [1983] B.C.D. Civ. 2058-10 (B.C.S.C.). In *Corbett* v. *Co-Operative Fire and Casualty Co.*, [1985] 1 W.W.R. 462 (Alta. Q.B.), an Alberta court specifically noted that British Columbia courts lacked any general discretion to refuse to add prejudgment interest to a judgment, while in *K.R.M. Construction Ltd.* v. *British Columbia Ry. Co.*, (1982) 40 B.C.L.R. 1 (B.C.C.A.), the Court of Appeal (at 35) specifically adverted to the mandatory nature of the legislation.

[2] *See* Appendix B.

[3] R.S.S. 1977, c. Q-1.

[4] *See Queen's Bench Act*, C.C.S.M., c. 280, s. 71, 72, replaced by *The Judgment Interest and Discount Act*, S.M. 1986, c. 39 (in force Sept. 10, 1986); *Judicature Act*, R.S.A. 1980, c. J-1, s. 15; replaced by the *Judgment Interest Act*, R.S.A. 1980, c. J-0.5 (1984).

[5] Manitoba Law Reform Commission, *Report on Prejudgment Compensation on Money Awards: Alternatives to Interest*, (Report No. 47, 1982), at 3-7.

orders otherwise. In New Brunswick, courts have been given a completely unfettered discretion.[6] In Ontario the *Courts of Justice Act, 1984*[7] provides that a person who is "entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon."[8] This *prima facie* right is, however, subject to a limitation in section 140:

> **140.** The court may, where it considers it just to do so, having regard to changes in market interest rates, the circumstances of the case, the conduct of the proceeding or any other relevant consideration,
>
> (a) disallow interest under section 138 or 139;
>
> (b) . . .
>
> (c) . . .
>
> in respect of the whole or any part of the amount on which interest is payable under section 138 or 139.

In Nova Scotia the discretion is more limited. Section 38(11) of the *Judicature Act*[9] provides:

> (11) The Court in its discretion may decline to award interest. . .
>
> (b) if the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded; or
>
> (c) if the claimant has been responsible for undue delay in the litigation.

A similar approach is taken in section 5(3) of the *Uniform Judgment Interest Act* which provides:[10]

> (3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or any part of the amount for which judgment is given, refuse to award interest under this Part, or award interest under this Part at a rate or for a period or both other than a rate or period determined pursuant to section 6.

Other Commonwealth jurisdictions have also introduced a general discretion into their prejudgment interest schemes. New South Wales,[11] Victoria,[12] Queensland,[13] South Australia,[14] and Western Australia[15] all provide for a general discretion in the court to decline to award prejudgment interest.

The mandatory nature of an award of prejudgment interest in British Columbia appears to be unique in the Commonwealth. Since so many Commonwealth jurisdictions have modelled their prejudgment interest on English legislation, and incorporate its discretionary features,[16] it is difficult to find a

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[6] *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 45.

[7] S.O. 1984, c. 11.

[8] *Ibid.* s. 137. In Ontario, it has been held that a claim for prejudgment interest must be set out in the writ (*Elman* v. *Ballantyne*, (1982) 34 O.R. (2d) 672, (Ont. H.C.), *aff'd* 38 O.R. (2d) 704n (Ont. C.A.)) and the facts supporting the exercise of the court's general discretion specifically pleaded if the defendant intends to argue that no prejudgment interest should be awarded: *Bonner* v. *Day*, (1985) 29 A.C.W.S. (2d) 62 (Ont. H.C.).

[9] C.S.N.S. 1979, c. J-3. The Prince Edward Island statute is identical: R.S.P.E.I. 1974, c. J-3, s. 33, 34 as amended by S.P.E.I. 1982, c. 13, s. 1.

[10] *See* Annex B to the *Judgment Interest Supplementary Report* by the Saskatchewan Commissioners, itself Appendix T to the *Proceedings of the Uniform Law Conference of Canada*, 1982 at 299. Although it was initially decided that a *Uniform Judgment Interest Act* should not contain a general discretion to refuse an award of interest, or vary the period in which it is payable, the version finally adopted by the Uniform Law Conference did contain a general discretion to decline an award of interest.

[11] *Supreme Court Act 1970-1980*, s. 94 (N.S.W.).

[12] *Supreme Court Act*, 1958, s. 78, 79, 79A (which provides that interest shall be awarded unless "good cause is shown to the contrary.")

[13] *Queensland Common Law Practice Act 1867*, s. 72 (as amended in 1972).

[14] *South Australian Supreme Court Act, 1935-75*, s. 30C.

[15] *Supreme Court Act 1935-1982*, s. 32.

[16] The English cases on personal injury awards have, since 1969, referred to awards of prejudgment interest as "mandatory." In that year the *Administration of Justice Act, 1969* (U.K.), 1969, c. 58 added a new section, 22, which required an award of prejudgment interest in personal injury cases where judgment is given in a personal injury case for a sum in excess of £200, "unless the court is satisfied that there are special reasons why no interest should be given." Similar qualifications may be found in the *Administration of Justice Act, 1982* (U.K.), 1982, c. 53, s. 15 respecting prejudgment interest. These qualifications preserve the general discretion in substance.

reasoned exposition of the case for and against discretionary awards of prejudgment interest.

Many of the United States have no prejudgment interest legislation, and compensation for delay in payment is purely a matter of damages. In other states, statutes provide for some form of prejudgment compensation. It has been suggested that "the modern trend is to recognize prejudgment interest as an ordinary element of damages present in all cases."[17] A growing number of American jurisdictions view compensation for delay in payment by way of prejudgment interest as mandatory.[18]

2. The Judicial Exercise of a General Discretion

(a) Canada

Little Canadian authority exists concerning the factors to be considered in exercising a general discretion to deny prejudgment interest. Generally, the question has been characterized as one which "depends upon the circumstances of the case."[19] In Ontario, the general rule favours an award of prejudgment interest if the defendant has had the use of the money in issue.[20] If the defendant wishes to dispute his liability for prejudgment interest, he must plead the relevant facts.[21] Despite these general observations, a number of factors have been cited consistently by courts.

(i) Conduct of the Action

The New Brunswick Court of Appeal, in *John Maryon International Ltd.* v. *New Brunswick Telephone Co.*,[22] took a fairly restrictive view of its general discretion, without enumerating all the factors to be considered in that regard. At trial, an award of prejudgment interest was refused because of the "exaggerated adversarial approach" adopted by the plaintiff.[23] On appeal this was held to be an improper exercise of the general discretion. After noting the general rule requiring an award of interest, LaForest J.A. observed:[24]

> There may, it is true, be exceptions to the rule. That is why (along with the need for precise computation of interest) a discretion is given to the courts. But that discretion must, as it seems to me, be exercised in accordance with the purposes of the statute giving the power. . . . [The] discretion must be related to the task of putting the plaintiff in the same position, so far as money is concerned, as he would have been if he had not suffered the loss. . . . [Such as where the plaintiffs] had not lost the use of their money.

This suggests that the general discretion should be exercised only where there is some economic reason for declining to award interest.

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[17] We have not undertaken a comprehensive survey of American jurisdictions in this regard. New York, for example, makes an award of prejudgment interest on damages in contract and property actions mandatory: *see* Article 5001, Civil Practice Law and Rules. The court retains a discretion over the rate and date from which interest runs. The New York Law Revision Commission recommended in 1966 that Article 5001 be amended to provide for interest in an action to recover damages for personal injury; *see* State of New York, Law Revision Commission, Report, Recommendations, and Studies, 1967 at 239-243. For a general survey of American law on point, *see*: J.A. Williams, "Prejudgment Interest: An Element of Damages Not to be Overlooked," (1977) 8 Cumb. L. Rev. 521 at 527-528; *see also* A.E. Rothschild, "Prejudgment Interest: Survey and Suggestion," (1982) 77 N.W.U. L. Rev. 192, 194.

[18] *E.g.*, Alaska, Colorado, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New York, Oklahoma, New Jersey, Texas and Utah. *See* Rothschild, *supra*, n. 17 at 209, fn. 97; Williams, *supra*, n. 17 at 509; M.K. Brown, "The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases," (1982) 16 U.S.F.L. Rev. 325, 339; R.E. Nye, "Denham v. Bedford, Statutory Prejudgment Interest and its Effect on Third Party Insurers," [1979] Det. Coll. L. Rev. 345, 346-7. Even in these jurisdictions, the issue is not whether a general discretion is desirable. The debate appears to turn on the question of whether an unliquidated sum whose exact amount is unascertainable until judgment should bear interest.

[19] *Harrand* v. *Saskatchewan Government Insurance Office*, (1979) 100 D.L.R. (3d) 504 (Sask. C.A.).

[20] *Pynn* v. *Surbey*, (1981) 8 A.C.W.S. (2d) 169, No. 0331 (Ont. C.A.); *see also* in Alberta, *Dickson* v. *Poon*, (1982) 26 C.P.C. 119 at 124-5 (Alta C.A.).

[21] *Bonner* v. *Day*, (1985) 47 C.P.C. 278 (Ont. H.C.).

[22] (1982) 141 D.L.R. (3d) 193 (N.B.C.A.).

[23] *Ibid.* reported at (1981) 33 N.B.R. (2d) 543, 80 A.P.R. 543 at 627. It appeared that the defendant had been equally intransigent, but no argument that interest be increased to penalize him was advanced.

[24] *Supra*, n. 22 at 239.

A litigant's conduct was a factor in several Ontario cases. In *French* v. *Zuzic*,[25] an additional award of interest was made to penalize a defendant who had refused unreasonably to make *ex gratia* advance payments. In *Pilot Insurance Co.* v. *Henshaw*, the insurer, who brought action to recover money paid on a claim by mistake of fact, was denied prejudgment interest and costs because its procedures were "sloppy and presumptive."[26]

Section 140 of the Ontario *Courts of Justice Act, 1984* permits courts to consider "the circumstances of the case" and the "conduct of the proceeding" or, for that matter, "any relevant consideration" and to disallow prejudgment interest.[27] This suggests that prejudgment interest may be withheld as a penalty.

(ii) Delay

The factor most commonly cited by Canadian courts is delay on the part of the plaintiff, either in the commencement or prosecution of an action.[28] Accordingly, in *City of Moncton* v. *Aprile Contracting Ltd.*,[29] the plaintiff was deprived of a portion of the prejudgment interest which would otherwise have accrued during the "10 year span of the litigation."[30] In one case, the court has justified depriving the plaintiff of prejudgment interest on the novel ground that if the defendant were compelled to pay it, owing to delay, his total liability would double:[31]

> Plaintiff sought an amendment to claim [prejudgment interest]. Normally such an amendment is granted but in this case I think it should not be. The reason is that it would far overbalance the amount of the claim. . . . Such interest would approximate a doubling of the claim and would substantially alter the case to be met by the defendants. I think it is too late to make the amendment.

The court did not explain how the impact on the defendant was relevant. Presumably the benefit to the defendant of retaining, or not being compelled to return the money, would have been of substantial value. Delay would appear to be of little significance. The defendant's obligation to pay interest, calculated over any period, is balanced by the benefit, accruing over that period, of having the use of the money.

At least one Canadian court has expressed the view that delay is irrelevant when the defendant has had the use of the money in issue. In *Kenting Drilling Ltd.* v. *General Accident Assurance Co. of Canada*, Moshansky J. of the Alberta Supreme Court, Trial Division, held:[32]

> Finally on the subject of interest, I must say that the defendant's argument that the action proceeded at a pace mutually convenient to both sides, which pace I would characterize as tortoise-like, is totally irrelevant to the larger question of whether or not interest ought to be awarded. Clearly, if the money had been paid in full by the defendant at the same time as its 50% contribution was paid, then the defendant would not have had the use of it in the intervening years and it would of necessity have been in the same position as it is now when called upon to pay interest for its use in the interim.

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[25] (1984) Ontario Lawyer's Weekly, vol. 3, No. 8, (June 22, 1984) at 2 (Ont. H.C.).

[26] (1985) 32 A.C.W.S. (2d) 495 (Ont. H.C.).

[27] Under the prior legislation, the role of the discretion was undefined. *Cf. Rowe* v. *Investors Syndicate*, (1984) 28 A.C.W.S. (2d) 282 (Ont. H.C.) in which the plaintiff went to trial, even though a default judgment could have been taken. Prejudgment interest was denied for the period after which default judgment could have been taken. *See* R. Roth, "Pre-Judgment Interest and the Personal Injury Action," (1983) 4 Adv. Q. 219, 227.

[28] *See, e.g., Canada Square Corp.* v. *VS Services Ltd.*, (1981) 34 O.R. (2d) 250 (Ont. C.A.); *Arras Gallery Ltd.* v. *R. in Right of Ontario*, (1985) 29 B.L.R. 253, 258-9 (Ont. H.C.).

[29] 19 N.B.R. (2d) 445; 30 A.P.R. 445 (N.B.S.C.), *aff'd* (1980) 66 A.P.R. 631, 686 (N.B.C.A.).

[30] *Ibid.* at 686 (N.B.C.A.). *See also Bean* v. *Hachey*, (1978) 44 A.P.R. 701, 23 N.B.R. (2d) 701 (N.B.Q.B.); *Central Business Exchange Ltd.* v. *Goodman*, Ontario Lawyers Weekly, vol. 5, No. 22 (Oct. 11, 1985) (Ont. H.C.).

[31] *Phillips* v. *Bongard Leslie & Co.*, (1985) 33 C.C.L.T. 59, 72 (Ont. H.C.) *per* Eberle J.

[32] [1979] 5 W.W.R. 68, 26 A.R. 90, (1980) 102 D.L.R. (3d) 99, 115 (D.L.R.). For a general statement of the Alberta law prior to the enactment of the *Judgment Interest Act*, R.S.A. 1980, c. J-0.5 in 1984, *see* R.J. Thrasher, "Recovery of Interest as Damages," (1984) 22 Alta. L. Rev. 154.

(iii) The Need to Assess or Quantify the Claim

In a number of cases, an argument has been advanced that the court should decline to award interest when, by reason of the nature of the claim, it was impossible either to quantify the loss or to determine the validity of the claim in law. In both cases, the argument turns on whether the defendant could be said to be in a position to determine properly whether the claim should be paid, or how much to pay. In *Mason* v. *Peters*,[33] it was argued that the novelty of the claim justified the refusal of an award. That argument was rejected:[34]

> One further matter remains which may be dealt with briefly. The respondent has cross-appealed against the judge's refusal to grant prejudgment interest solely because of the case's novelty as the first child fatality action to be decided under the *Family Law Reform Act*. With deference, that of itself does not constitute a proper basis upon which to deprive the respondent of the prejudgment interest to which she is otherwise entitled. . . [T]o do so constitutes error in principle.

In contrast, in *QCTV Ltd.* v. *Edmonton*, Stratton J. of the Alberta Court of Queen's Bench held that it was proper to refuse an award of prejudgment interest when the defendant had a *bona fide* doubt concerning the validity of the claim:[35]

> I have concluded that the payment of the indebtedness in the present case was not *improperly* withheld by QCTV. . . and that it would not be fair and equitable to allow interest to the city. I am satisfied that QCTV through its president and general manager, Mr. Polanski, held a *bona fide* belief that QCTV did not owe to the city the special franchise charge in question.

On appeal a different view emerged:[36]

> [QCTV] commenced making payments under the agreement, then ceased while it took the above proceeding. Through its counsel it advised the city that "our client has sufficient funds to pay whatever monies might be determined to be owing to the City but has withheld payment pending clarification of what it is required to pay". Throughout it has had the use of funds withheld and in the above circumstances I am of the opinion that the funds were improperly withheld and that it is fair and equitable that QCTV make compensation by way of interest.

There appears to be no settled position respecting an award of interest when the defendant *bona fide* disputes the claim. In a number of cases it has been held that a payment of a debt is not "improperly withheld" within statutes patterned after *Lord Tenterden's Act* if a *bona fide* defence is tendered.[37] These cases turn on the requirement that interest is not to be awarded as a matter of course unless a just debt has been improperly withheld. Despite the strong language of the statute, a number of courts have held that the risk of error in denying a claim must fall on the defendant.[38] These cases are, in turn, difficult to reconcile with the Manitoba Court of Appeal's decision in *Dauphin Consumers Co-operative Ltd.* v. *Puchalski*,[39] in which payment of a debt was said not to be "improperly withheld" if the defendant had an arguable counterclaim.

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[33] (1982) 139 D.L.R. (3d) 104 (Ont. C.A.).
[34] *Ibid.* at 119 *per* Robins J.A. *per curiam*.
[35] [1983] 6 W.W.R. 602, 1 D.L.R. (4th) 116, 133 (Alta. Q.B.).
[36] [1985] 2 W.W.R. 414, 422; 35 Alta. L.R. (2d) 160 (Alta. C.A.).
[37] *Evergreen Irrigation Ltd.* v. *Belgium Farms Ltd.*, (1976) 3 A.R. 248, 257; *VS Services* v. *Hillcrest Manors*, (1976) 35 A.P.R. 248, (1976) 24 N.S.R. (2d) 248; *Suss Woodcraft Ltd.* v. *Abbey Glen Property Corp.*, [1975] 5 W.W.R. 57, 73 (Alta. S.C.); *Cedar Hut Restaurant Ltd.* v. *Wawanesa Mutual Ins. Co.*, [1985] 5 W.W.R. 673 (Sask. Q.B.); *Amerada Minerals Corp. of Canada Ltd.* v. *Mesa Petroleum (N.A.) Co.*, (1985) 37 Alta. L.R. (2d) 363 (Alta. Q.B.).
[38] *Kenting Drilling Ltd.* v. *General Accident Ass'ce. Co. of Canada*, *supra*, n. 32; *Pacific Petroleums Ltd.* v. *Concordia Propane Gas Marketers Ltd.*, (1977) 5 A.R. 421, 429 (Alta. S.C.); *Sherby* v. *Edmonton World Hockey Enterprises Ltd.*, (1979) 105 D.L.R. (3d) 644, 647; 22 A.R. 1 (Alta. Q.B.); *Piedemontese Breeding Co-operative Ltd.* v. *Madill*, (1985) 33 A.C.W.S. (2d) 63 (Sask. C.A.). The Alberta Court of Appeal has held that it is an "established practice" that insurers pay prejudgment interest when judgment is given against them: *Law Society of Alberta* v. *Continental Insurance Co.*, (1984) 36 Alta. L.R. (2d) 51 (Alta. C.A.).
[39] [1984] 2 W.W.R. 673 (Man. C.A.).

Nor is there unanimity on the effect of a dispute over *quantum*. In *Eyben* v. *K.R. Ranches (1970) Ltd.*,[40] the defendant was obliged to pay prejudgment interest only on the undisputed portion of a debt. In contrast, in *Westwood Electric and Appliance Service Ltd.* v. *Manitoba Public Insurance Corp.*,[41] payment of prejudgment interest was required. The trial court held that the only doubt involved concerned the value of loss and not liability on the insurance policy.

The Ontario Court of Appeal has proved unwilling to deny interest merely because the defendant was conducting a *bona fide* investigation into the merits of the plaintiff's claim. In *Dugdale* v. *Boissneau*,[42] a personal injury case, prejudgment interest was awarded at trial only from the date the plaintiff submitted to a medical examination. It was held by Montgomery J. that the plaintiff could not be said to be "kept out of her money" until the defendant could properly assess the medical aspects of her claim. This judgment was reversed on appeal,[43] on the ground that the reason cited was "insufficient" to permit the trial judge to depart from the general rule. In contrast, in Manitoba it has been held to be a proper exercise of the court's discretion to refuse prejudgment interest when the defendant failed to prove arson, but an "aura of suspicion" surrounded the claim.[44]

(b) England

Although English courts have had a power to award interest on judgments since 1934,[45] in practice the power was ignored. Only rarely did English courts award prejudgment interest.[46] However, as a result of the *Report of the Committee on Personal Injuries Litigation* (The Winn Report),[47] the 1934 legislation was amended in 1969[48] to make an award of interest mandatory in a case involving personal injury where the judgment exceeded £200, unless there existed "special reasons why no interest should be given."

The effect of this amendment, came before the English Court of Appeal in *Jefford* v. *Gee*.[49] Lord Denning M.R. formulated a number of guidelines.[50] The majority of these guidelines deal with economic factors. The intent was to exclude prejudgment interest in respect of those losses which in fact occur after the date of trial.[51] The only non-economic factor in the guidelines was "gross delay."

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[40] [1982] 5 W.W.R. 269, 137 D.L.R. (3d) 332 (Alta. C.A.); *see also Morrison* v. *City of Edmonton*, (1982) 137 D.L.R. (3d) 174 (Alta. Q.B.); *C.E.G.F. Canada Ltd.* v. *A.P.V. Crepaco-Montreal Ltd.*, (1984) 28 A.C.W.S. 551, (P.E.I. S.C. *in banco*); *Smith* v. *Royal Insurance Co.*, [1983] 3 W.W.R. 577 (Alta. C.A.), leave to appeal refused [1983] 6 W.W.R. lvi (S.C.C.).

[41] [1982] 4 W.W.R. 201 (Man. Q.B.) [1983] 3 W.W.R. 270, 276 (Man. C.A.). *See also Renaissance Resources Ltd.* v. *Metalore Resources Ltd.*, [1984] 4 W.W.R. 430 (Alta. Q.B.); *Evergreen Irrigation* v. *Belgium Farms Ltd.*, [1976] 3 A.R. 248 (Alta. S.C.-T.D.).

[42] (1982) 26 C.P.C. 138 (Ont. H.C.).

[43] (1983) 41 O.R. (2d) 152 (Ont. C.A.); leave to appeal refused (1983) 20 A.C.W.S. (2d) 65 (S.C.C.).

[44] *Olynyk* v. *Advocate General Insurance Co. of Canada*, (1985) 32 A.C.W.S. (2d) 133 (Man. C.A.) *aff'g* [1985] 1 L.R. 1-1885.

[45] *Law Reform (Miscellaneous Provisions) Act, 1934*, 24 & 25 Geo. 5, c. 41, s. 3, since superseded by the *Administration of Justice Act, 1982*, *supra*, n. 16.

[46] Report of the Committee on Personal Injury Litigation; *see also* submissions of counsel in *Jefford* v. *Gee*, [1970] 2 Q.B. 131, 133, 135, [1970] 1 All E.R. 1202 (C.A.).

[47] (1968) Cmnd. 3691 at 25.

[48] By the *Administration of Justice Act, 1969*, *supra*, n. 16, s. 22. This provision was carried forward by the *Administration of Justice Act, 1982*, *supra*, n. 16.

[49] *Supra*, n. 46.

[50] The leading case on the ambit of the discretion prior to *Jefford* v. *Gee* was *Riches* v. *Westminster Bank Ltd.*, [1943] 2 All E.R. 725, 726 (C.A.), in which DuParcq L.J. described it as "as unfettered as any discretion can be." The case is not much cited in Canada, *but see Theriault* v. *Day & Ross Ltd.*, (1978) 37 A.P.R. 120, 131 (N.B.C.A.).

[51] The guidelines are summarized *ibid.* at 151.

A number of later cases discuss the discretionary guidelines in terms of their economic impact on the plaintiff and defendant.[52] Other non-economic factors have also emerged.

(c) Australia

In Australia, the nature and ambit of the general discretion conferred by prejudgment interest legislation has been controversial.[53] Most of the controversy concerns the economic consequences of awards of interest. On occasion, however, Australian courts have adverted to other factors which might be relevant to the exercise of a general discretion. The prime factor cited has been delay. Australian courts have, for the most part, accepted without argument Lord Denning's dictum in *Jefford* v. *Gee* that gross delay on the part of the plaintiff justifies a refusal to award interest.

3. Arguments for and Against a General Discretion

The proposal that there be no discretion to refuse prejudgment interest evoked the largest volume of critical comment from those who responded to the Working Paper that preceded our 1973 Report.[54] Two main objections to the proposal were raised. If the plaintiff delays resolution of the case, it may work a hardship on a defendant, and particularly on one who had not had the actual use of the money due the plaintiff. The Commission's response was as follows:[55]

> The Commission seriously questions the proposition that requiring the defendant to pay pre-judgment interest, even where the plaintiff has been guilty of unnecessary delay, would visit an unnecessary hardship on the defendant. In cases where the defendant has funds continuously available to satisfy the judgment, he is always able to invest those funds at an appropriate interest rate and thus suffers no loss if required to pay those funds, plus accrued interest at the legal rate, to the plaintiff. The defendant who invests wisely may even profit from the plaintiff's delay.
>
> The defendant who does not have funds continuously available to satisfy the judgment must obviously borrow. If the plaintiff's delay causes him to borrow at a later, rather than an earlier date, surely the defendant has saved the cost of borrowing during the interval. It does not seem to work a hardship on the defendant to require him to pass that saving, or a portion thereof, on to the plaintiff.

The second objection also focused on delay. It was argued that the loss of use of money was self-inflicted. The plaintiff could, and should, have mitigated his loss by bringing on his action sooner. In respect of this objection it was observed:[56]

> The Commission feels that the analogy between delay in pursuing an action, and the failure of a plaintiff to mitigate his damages arising from a breach of contract, is not wholly apt. The difference, it seems to us, is that a loss caused by the failure of a plaintiff to mitigate his damages is one against which the defendant would be unable to protect himself, were he liable. Extra interest which may be payable as a result of the plaintiff's delay is, however, something against which the defendant can protect himself by investing the funds available to satisfy the judgment, by not incurring the cost of borrowing funds until required, or by making a payment into Court.

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[52] *See* the cases discussed in the Working Paper at 67 to 69. In *Cookson* v. *Knowles*, [1977] Q.B. 913, [1977] 2 All E.R. 820, the Court of Appeal attempted to alter the guidelines by proscribing any award in cases involving non-pecuniary loss. This effort was overruled by the House of Lords in *Pickett* v. *British Rail Engineering Ltd.*, [1980] A.C. 136, [1979] 1 All E.R. 774 (H.L.); *see also Birkett* v. *Hayes*, [1982] 1 W.L.R. 816, [1982] 2 All E.R. 710 (C.A.), and *Wright* v. *British Railway Board*, [1983] 2 A.C. 773, [1983] 2 All E.R. 698 (H.L.).

[53] *See* the cases discussed in the Working Paper at 69-73.

[54] LRC 12 at 24.

[55] *Ibid.* at 24-25.

[56] *Ibid.* at 25.

One of the grounds advanced by the Commission against giving undue delay greater weight was the availability of procedural devices and substantive law designed to inhibit or penalize delay. The Commission gave as examples of these limiting factors limitation periods, costs, and motions to dismiss for want of prosecution.[57]

A review of the Rules of Court currently in force indicates that this argument has even greater force than in 1973. There are a number of steps a defendant may take if he is of the view that the plaintiff is being unduly dilatory. He need not await service of the writ to appear to it. He may set down examinations for discovery at an early date. It is open to him to apply for summary judgment[58] or summary trial.[59] In either case, it is open to the court to limit the issues to be tried, or to impose a schedule on the plaintiff and defendant requiring compliance with pre-trial procedures by set dates.[60] Once a notice of trial has been given, (and it may be given by either party[61]) the defendant may request a pre-trial conference at which the court may give "such directions as the court thinks just," which "control the subsequent course of the action."[62] Although the plaintiff still has a large measure of control over the pace at which an action proceeds, it would appear that a defendant has ample means to compel the speedy hearing of an action.

The Western Australia Law Reform Commission, in its *Report on Prejudgment Interest*, decided that a wide discretion should form part of their reforming legislation:[63]

> A wide discretion is desirable because of the many variables that are regarded as relevant to awards of pre-judgment interest. These include:
>
> > the rate of interest appropriate to the relevant periods, having regard to the time at which damages are assessed and other matters;
> >
> > whether the defendant has been prejudiced because the plaintiff has been dilatory in bringing the claim;
> >
> > the component of the damages awarded that relate to economic and non-economic loss, and to past and future loss;
> >
> > whether the plaintiff has received, from other resources, compensation for loss suffered;
> >
> > whether the claimant has paid expenses incurred, and if so, at what time;
> >
> > whether there was a legitimate reason why the sum claimed was not paid earlier;
> >
> > whether the parties have agreed that pre-judgment interest should not be recoverable.

Of the "variables" noted, the first relates to the rate of interest, a matter dealt with later in this Report. The second, delay, has already been discussed.

The third variable isolated is of greater concern. It has two aspects. First, awarding interest on damages for loss yet to be suffered will overcompensate the plaintiff. Second, overcompensation may also result when a loss assessed in trial date dollars attracts prejudgment interest at market rates. Market rates of interest include a component representing the market's prediction of the future rate of inflation. If interest is awarded at that rate on a sum calculated in inflated trial date dollars, the plaintiff may be overcompensated.

These problems are met in part by section 2(a) of the *Court Order Interest Act*, which prohibits an award of interest on pecuniary loss arising

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[57] *Ibid.*
[58] Rule 18.
[59] Rule 18A.
[60] Rules 18(2), (7); 18A(5).
[61] Rule 39(2).
[62] Rule 35(4).
[63] Project No. 70, Part I at 33-34.

after the date of the order. The proper manner of accounting for inflation, and the prospect of apportioning damage awards into past and future components for the purpose of calculating prejudgment interest has not been free of difficulty. These issues are discussed later in this Report. There is no reason, however, why dealing with these issues requires a general discretion to refuse interest. The ambit of such a discretion would inevitably extend far beyond the problem of accounting for inflation, or apportioning awards. A narrower and more certain solution is both possible and practical.

The relevance of the fourth variable cited by the W.A.L.R.C. is dubious. If a plaintiff is entitled to judgment for a sum of money, then he should *prima facie* be entitled to interest upon it. If the plaintiff has received some kind of "collateral benefit" the issue before the court surely is whether or not the receipt of that benefit should disentitle the plaintiff to compensation from the defendant.

The fifth variable raises a question of when loss may be said to have occurred. This is a genuine problem, but it may be doubted whether a general discretion is required to deal with it. While some solution must be adopted there is no obvious advantage to leaving the issue at large to be determined by time-consuming and expensive litigation, rather than by legislation. Specific rules and a much more tightly focused discretion would seem preferable.

The sixth variable, the *bona fides* of withholding payment, echoes the debate surrounding the Canadian interest statutes based on *Lord Tenterden's Act* and whether or not payment had been "improperly withheld." The defendant's motives for refusing payment should be entirely irrelevant. If the defendant is liable to pay money either he had the use of money which he ought to have paid to the plaintiff forthwith, or he has been saved the expense of borrowing it. If no prejudgment interest is awarded, the defendant will be permitted to pay the plaintiff in dollars which may have lost a large proportion of their purchasing power through inflation.

The last variable identified by the Law Reform Commission of Western Australia was the possibility of an agreement excluding prejudgment interest. If it is thought desirable to permit contracting out of the statute, then it is difficult to see why the court should be given a power to override the agreement. In British Columbia, the *Court Order Interest Act* deals with this very problem in section 2, which forbids an award of prejudgment interest when there is an agreement "about interest," or if the right to interest has been waived in writing.

4. Conclusions Respecting a General Discretion to Refuse an Award of Prejudgment Interest

Our survey of the arguments for and against a general discretion to refuse an award of prejudgment interest, and the review of the judicial exercise of such a discretion has not led us to depart from the conclusion contained in the Commission's 1973 Report that legislation should not incorporate a general discretion. To introduce such a discretion would result in uncertainty and confusion, and would, we believe, considerably complicate litigation.

It is, however, possible to identify specific instances in which an award of prejudgment interest may be inappropriate. Examples were given earlier. In many Commonwealth prejudgment interest schemes, these problems are dealt with by courts exercising a general discretion. But it does not follow inevitably that a general discretion is required if other satisfactory solutions are to be found. It is possible to isolate those types of awards which lend themselves to overcompensation, and to devise particular rules to apply to them. It is an

over-reaction to these specific problems to confer a general discretion on the courts.

The conclusion that an award of prejudgment interest should be mandatory is fortified by the survey of the manner in which a general discretion is exercised by the courts of other jurisdictions. No settled principles have emerged at any but the most general level to guide judges in exercising their discretion. Judges in different jurisdictions frequently disagree on how the discretion is to be exercised. Even judges in a single jurisdiction frequently disagree on the relevance of particular factors.

In Australia, the result has been a number of appeals to State Appellate Courts, the High Court of Australia, and the Privy Council on matters of judicial discretion. Only recently has uniform jurisprudence emerged. In England, despite the efforts of the Court of Appeal in *Jefford* v. *Gee* to provide guidelines, the House of Lords has been called upon several times in recent years to reconsider those guidelines.[64] In Canada, no judicial consensus has emerged, although as a rule the courts in the prairie provinces have proven unsympathetic to arguments based on non-economic concerns,[65] while Ontario courts are more willing to deny prejudgment interest on non-economic grounds.[66]

It is our conclusion that a general discretion to refuse an award of prejudgment interest should not be incorporated into the *Court Order Interest Act*. The principles behind the *Court Order Interest Act* should be clearly embodied in a set of rules governing the entitlement of a party to prejudgment interest. If a case is identified in which the award of prejudgment interest is inappropriate, then the legislation should deal specifically with that case. This was also the conclusion reached in the Working Paper and it was not seriously challenged in any response we received.

It must be kept in mind that it is inappropriate to attempt to remedy defects in the substantive law by adjusting awards of prejudgment interest. An award of prejudgment interest should not turn on the fairness of the initial judgment, or on the manner in which it was obtained. The *Court Order Interest Act* should not be regarded as an omnibus vehicle for *ad hoc* law reform. Prejudgment interest should be viewed as a purely economic phenomenon designed to achieve compensation for the litigant who has been kept out of his money.

The Commission recommends:

2. The New Act should not confer upon courts a general discretion to withhold prejudgment interest from a litigant otherwise entitled to it.

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[64] *See* cases cited, *supra*, n. 52.

[65] *See, e.g., Piedmontese Breeding Co-operative Ltd.* v. *Madill*, *supra*, n. 38, and *QCTV Ltd.* v. *Edmonton*, *supra*, n. 35.

[66] In British Columbia the manipulation of prejudgment interest to serve non-economic ends has recently surfaced in another context. The Court of Appeal has held that it is proper for a trial judge to compel the plaintiff to waive the right to a portion of his prejudgment interest as a condition of obtaining an adjournment: *Beavan* v. *Vizjak*, (1986) 36 A.C.W.S. 393, [1986] B.C.D. Civ. 2058-06. *Compare Aamodt* v. *Winslow*, [1986] B.C.D. Civ. 2058-08 (B.C. Co. Ct.). Denying prejudgment interest to penalize a litigant for delay is a fundamental distortion of the principles underlying rights to prejudgment interest. Legislation implementing the Commission's recommendations should have the effect of clarifying those principles so that the courts will be unlikely to require its waiver for non-economic reasons.

CHAPTER III FIXING THE RATE OF INTEREST

A. Introduction

In British Columbia, the court has a wide discretion to set the rate at which prejudgment interest is to be paid. This discretion is subject only to a floor of 5% per annum.[1] In contrast, legislation in force in some jurisdictions stipulates the maximum rate payable. For example, in South Australia, the maximum is 7%,[2] while in Victoria it is 8%.[3] In Ontario, the rate is fixed at the "bank rate,"[4] although the court is given a discretion to fix a different rate if it is "just to do so in the circumstances."[5] The *Uniform Judgment Interest Act* takes a similar approach.[6]

B. The Current Law

Soon after the enactment of the *Prejudgment Interest Act*, some British Columbia courts expressed the view that the discretion to fix the rate of interest payable was to be exercised with regard to factors not wholly economic.[7] A clear example of this point of view is the decision in *Becker* v. *Ekkert*.[8] It was held that delay, the merits of the claim, and the plaintiff's conduct of the action were relevant considerations in fixing the appropriate rate of interest. This approach was also adopted in *Coast Tractor & Equipment Ltd.* v. *McDonald's Hatcheries Ltd.*, in which the plaintiff was awarded prejudgment interest at much higher than prevailing rates as a mark of disapproval of the way the defendant conducted the action:[9]

> . . . the action of the defendant in unnecessarily delaying its acknowledgment of its debt, as evidenced by its failure to defend at trial, places the matter in a different and rather special category. In these circumstances I consider that the rate requested is entirely appropriate and, accordingly, accede to plaintiff's submission that interest of 18 per cent be charged. . . .

This approach has been criticized. In commenting on *Becker* v. *Ekkert*, one writer stated:[10]

> Mr. Justice Craig's view would presumably leave the judge free to award, subject to a 5 per cent minimum, a purely derisory rate of interest as a mark of strong disapproval of particularly egregious conduct by the plaintiff. With the greatest respect to the learned judge, this seems unsound. There is a difference between prejudgment interest, and costs.

Similar reasoning persuaded the court in *Benton & Overbury Ltd.* v. *Canadian Construction Enterprises*[11] that deliberate delay by a defendant should not result in an assessment of a punitive interest rate.[12]

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[1] Section 1, *Court Order Interest Act*. The 5% floor will be removed when the provisions of the *Court Order Interest Act Amendment Act*, S.B.C. 1982, c. 47 come into force.

[2] *Supreme Court Act, 1958* (No. 6387), s. 79A.

[3] *Supreme Court Act*, s. 30(2)(a).

[4] Defined by s. 137(1)(2) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11 as the "bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to the chartered banks."

[5] *Ibid.*, s. 140(b).

[6] *See* Appendix G, s. 5(3).

[7] The Commission's original recommendations called for a flat rate of 5%, and, accordingly, the 1973 *Report on Pre-Judgment Interest* does not contain a discussion of the manner in which this discretion ought to be exercised.

[8] [1975] B.C.D. Civ. *sub.* Practice (B.C.S.C.).

[9] (1976) 1 B.C.L.R. 399, 400 (B.C. Co. Ct.). *See also MacLeod* v. *Rinck*, (1984) 25 B.L.R. 179 (B.C.S.C.) in which a lawyer was awarded prejudgment interest at the minimal rate of 5% because, in the opinion of the judge, his fee was excessive. This view was taken even though it did not appear that the client objected to the fee, and in fact, had negotiated a considerable reduction from the first account presented.

[10] L. Getz, "More About Prejudgment Interest," (1976) 34 Advocate 121.

[11] [1976] B.C.D. Civ. *sub.* Prejudgment Interest (B.C.S.C.).

[12] The *Benton* case is unusual. It marks one of the few cases in which an argument has been made that punitive interest rates be assessed against dilatory defendants. There seems to be little support for that position in the jurisprudence. Nevertheless, Lord Donaldson M.R. of the English Court of Appeal has recently suggested that courts have the power to assess prejudgment interest at 50% above the normal rate in cases in which the defendant engaged in delaying tactics. *The Times*, March 15, 1985.

A number of other factors have been referred to by British Columbia courts. The interest rate actually paid by a plaintiff who was wrongfully kept out of money has been both accepted and rejected as an indicator of the appropriate rate of prejudgment interest. In the *Benton* case,[13] the rate was set at 10 3/4%, the rate paid by the plaintiff for borrowed money. In contrast, in *Ainslie* v. *Gould*,[14] the plaintiff was awarded 8% rather than the 12% he had actually paid on money borrowed to replace that withheld by the defendant, on the ground that the lesser figure constituted "what one might expect as a reasonable return on investment." In one case, the court reduced the rate of interest payable by the defendant because the error giving rise to the action was induced by the plaintiff.[15]

Another subjective factor seen as relevant is the rate charged by the defendant on overdue accounts owing to it. In *Crown Zellerbach Canada Ltd.* v. *R. in Right of British Columbia*, Meredith J. held:[16]

> What is good for the tax collector should be good for the taxpayer. If the tax collector can call for and obtain interest, elementary fairness asks that it reimburse the taxpayer for moneys illegally collected together with interest at the same rate as it collected, at least until the date of judgment.

Reliance on this factor has resulted in awards of prejudgment interest much higher than prevailing market rates.[17]

British Columbia courts often look to purely objective criteria. In a number of cases courts have followed Lord Denning's suggestion in *Jefford* v. *Gee*,[18] and adopted the rate payable in respect of funds paid into court.[19] This rate is fixed at 2% below the prime lending rate of a particular chartered bank.[20] Alternatively, in a number of cases, interest is awarded at the rate fixed by the Registrar of the Supreme Court for default judgments.[21]

It is readily apparent that these two indicators of the appropriate interest rate are objective. They have nothing to do with the actual financial position of the plaintiff or the defendant, or with the notion that fair compensation should be measured with regard to their financial acumen. Arguments which seek to inject the subjective position of a litigant into the process of fixing the proper rate of prejudgment interest are rarely addressed to British Columbia courts. Litigants are usually content with the application of one or the other of the objective indicators sanctioned by prior case law.

The high water mark of the "objective" approach to setting a proper rate of prejudgment interest is probably the decision of Taylor J. in *Gillis* v. *Bates*.[22] In this case, it was argued by the defendant that the rate should be low, since the damages reflected some future loss, the plaintiff had un-

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[13] *Supra*, n. 11.

[14] [1975] B.C.D. Civ. *sub.* interest, [1975] W.W.D. 3 (B.C.C.A.).

[15] *Service Packing Co. Ltd.* v. *Fraser Valley Mushroom Grower's Co-operative Association*, (1985) 60 B.C.L.R. 336, 342 (B.C.S.C.).

[16] (1979) 8 B.C.L.R. 187, 198 (B.C.S.C.), *rev'd* 13 B.C.L.R. 276 (B.C.C.A.).

[17] *Bissett et al.* v. *Doman Industries Ltd.*, (1979) 12 B.C.L.R. 189 (B.C.C.A.). *See also Williams* v. *Arma Holdings*, [1979] B.C.D. Civ. 954-03, (B.C.S.C.).

[18] *Jefford* v. *Gee*, [1970] 2 Q.B. 131, [1970] 1 All E.R. 1202 (C.A.).

[19] *O'Grady* v. *I.C.B.C.*, [1976] B.C.D. Civ. *sub.* Practice (B.C.S.C.). *McClelland* v. *Joplin*, [1979] B.C.D. Civ. 3360-02 (B.C.S.C.).

[20] The "banker to the Province." *See* Rule 58(5), Rules of Court; O.I.C. 2578, B.C. Gazette Pt. II, 13 Sept. 1977 at 604.

[21] *See, e.g., Kirby* v. *Johnson*, [1981] B.C.D. Civ. 3391-03, p. 18 of judgment (B.C.S.C.). Reference to this figure carries with it the additional advantage of a fluctuating rate throughout the prejudgment period, since the Registrar's rate is updated at regular intervals. *See K.R.M. Construction Ltd.* v. *B.C. Ry. Co.*, [1981] B.C.D. Civ. 2058-16 (B.C.S.C.), *aff'd* (1983) 40 B.C.L.R. 1 (B.C.C.A.); *Brooks* v. *Karapidakis*, (1982) 35 B.C.L.R. 287 (B.C.S.C.); *Good* v. *North Delta-Surrey Sentinel*, [1985] 1 W.W.R. 166 (B.C.S.C.); *Doonanco* v. *Rudman*, [1983] B.C.D. Civ. 3399-04 (B.C.S.C.); *Cottrell Transport Ltd.* v. *Director of Employment Standards*, (1984) 58 B.C.L.R. 299 (B.C. Co. Ct.).

[22] (1979) 12 B.C.L.R. 375, [1979] 5 W.W.R. 164, 100 D.L.R. (3d) 682 (B.C.S.C.). This decision was specifically approved by the British Columbia Court of Appeal in *McArthur* v. *Barton*, (1982) 37 B.C.L.R. 10, leave to appeal refused (1983) 40 B.C.L.R. xxx(S.C.C.), although in *James Halstead Ltd.* v. *Pacific Worth Distributors Ltd.*, [1985] B.C.D. Civ. 954-04, Southin J. indicated a willingness to lower the rate of prejudgment interest to punish the plaintiff, if "permitted."

necessarily delayed bringing the matter to trial, and the jury had probably taken the fact of the plaintiff being kept out of his money into account when assessing the plaintiff's loss. The plaintiff argued that the court's sole task was to determine the prevailing rate of interest. The latter submission was accepted. Taylor J. held:[23]

> I find it impossible to conclude from the words of the Act, considered in the context of the realities of our legal system, that the legislature intended the rate set to be one which would compensate the parties for matters of the type here raised by the defendants. The fact that a trial of issues of this sort after the trial of the action itself must be time-consuming is no reason why it should not take place if that intent can reasonably be ascribed to the statute. It is not because of the difficulty of the task, but because of the virtual impossibility of arriving at a fair conclusion that I find myself unable to presume, in the absence of clear words to that effect, that the legislature intended it. Since a 5 per cent rate, at least, must be awarded in favour of the plaintiff, clearly the courts could not do the type of justice for which the defendants here argue in a case were the equities are overwhelmingly on the side of a defendant. Where the equities were equally clearly on the side of a plaintiff a rate of 50 per cent might be indicated. I do not think the legislature could have intended such a rate; I do not think the process would really be one involving the setting of an *interest rate* at all. Interest is compensation for use of money.
>
> The purpose of the Act is, I think, a far less ambitious one. It is simply to ensure, subject to certain specified exceptions, that the earning capacity of money awarded, from the date it is due to that on which it is adjudged due, shall accrue to the plaintiff and not, as in the past, to the defendant. The measure will normally be established by the money markets the rate available on safe short-term investments during the relevant period. . .
>
> The task of the court, then, in a case such as the present is simply to strike an interest rate which represents the average for the period from creation of the cause of action to judgment. I suggest the appropriate rate in this case to be 9 per cent per annum but invite written submissions based on actual rates paid on suitor's funds over the relevant period if either party wishes to argue for a more precise average rate.[24]

In England and Australia, the judicial discretion to fix an interest rate, or to lower the statutory rate, has been exercised in order to suppress any inflation component in a judgment, thereby preventing any duplication. The criteria have been exclusively economic.[25] There have been, however, some indications in Australian cases that non-economic criteria might be relevant.[26] In New South Wales, some of the uncertainty respecting the appropriate rate of interest has been settled by a practice direction,[27] while in England, recent amendments to the *Supreme Court Act (1981)* and the *County Court Act 1959* provide for a fluctuating rate of prejudgment interest to be fixed by the Rules of Court.[28]

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[23] *Ibid.* at 381. *Cf. Algoma Central Ry.* v. *The Ship "Cielo Banco"*, (1984) 29 A.C.W.S. (2d) 319 (F.C.-T.D.) in which the Federal Court, sitting in Admiralty, chose a different commercial rate — the average of bank prime rates in effect from time to time.

[24] *Leischner* v. *West Kootenay Power & Light Co.*, (1986) 70 B.C.L.R. 145 (B.C.C.A.) may represent something of a retreat from *Gillis* v. *Bates* since the Court of Appeal approved an exercise of discretion which fixed a lower interest rate to avoid duplication arising from inflation.

[25] In *Smith* v. *In Shoppe Pty. Ltd.*, [1976] 2 N.S.W.L.R. 175 (N.S.W.S.C.), for example, Holland J. adopted the rate charged for bank overdrafts on grounds similar to those advanced in *Gillis* v. *Bates*, *supra*, n. 22.

[26] In *Honey* v. *Kehoe*, [1974] 6 S.A.S.R. 463, 468-469 (S.A.S.C.) Bray C.J. stated:

> 1. *The rate.* Prima facie I think it should be 7%. It cannot be more (sub-s. (2)(a)). But the Court in its discretion can fix a lower rate for a variety of reasons. One might be that the money will, in any event, have to be transferred to the Public Trustee or someone else to be administered on the plaintiff's behalf and would have had to have been so transferred if it had been paid at the commencement of the action and as such would have carried a lower rate of interest than 7%. I do not say that this would necessarily be a decisive factor but the Court can, in my view, take it into account.

[27] Practice Note No. 25, [1982] 2 N.S.W.L.R. 442 provides:

> When computing interest . . . the following yearly rates of interest are appropriate to guide the Court:
> (a) 1st January, 1974, to 31st December, 1980 — 10 per cent
> (b) 1st January, 1981, to 30th June 1981 — 13.5 per cent;
> (c) 1st July, 1981, to 30th June, 1982 — 14.5 per cent;
> (d) from 1st July, 1982 — 15.5 per cent.

[28] *Administration of Justice Act, 1982*, c. 53.

C. An Evaluation of the Current Law

Two conclusions can be drawn from cases which consider the discretion to fix an interest rate. First, the criteria to be used are not yet fully settled. Second, in general, British Columbia and foreign courts are unconcerned with inquiring into the subjective positions of the litigants in setting the rate of interest. In British Columbia, the rate of prejudgment interest is usually fixed with reference either to the rates set by the registrar for default judgments, or to the rate payable on funds in court. Neither rate is calculated in accordance with the position of any particular litigant. Courts relying on these rates have delegated the task of fixing the applicable rate. One justification for this practice is that these rates represent fair compensation. In *James Halstead Ltd.* v. *Pacific Worth Distributors Ltd.*, Southin J. observed:[29]

> From my own observations, the registrar's rates are the same or a little below the rates on Canada Savings Bonds and sometimes a little higher than the rates paid by bankers to customers making short-term deposits. Thus,. . . I take judicial notice that they are reasonable rates.

In cases where the fixing of a rate has been expressly considered, the rate of interest adopted is expressly determined with regard to yet another objective index — the return on short-term safe investments. Deviation from this standard is justified only in "unusual" circumstances.

D. Conclusions

Our preference is that the broad discretion to set the rate of prejudgment interest should be abolished in favour of a fixed conventional rate (or rates if economic circumstances warrant). This rate would apply in any case in which prejudgment interest was awarded, without reference to the peculiar circumstances of the plaintiff or defendant. British Columbia courts have displayed a marked preference for an objectively determined rate of prejudgment interest; the discretion is seldom exercised in practice, and is objectionable in principle.

This general rule should be subject to an exception where a foreign money liability is in issue. This is important, having regard to the recommendations made by this Commission respecting foreign money liabilities. Flexibility is necessary in this context.

The Commission recommends:

3. *(1) Under the New Act courts should have a discretion to fix a rate of interest only in cases in which foreign interest rates are in issue.*
   (2) In all other cases, courts should be obliged to award prejudgment interest at a statutory rate or rates determined in accordance with the New Act.

E. Fixing the Rate of Interest

1. Introduction

Recommendation 3 leaves open a number of important questions:

1. Should there be one rate or more than one rate?
2. Should the rate fluctuate?
3. How should the rate(s) be fixed?
4. Should interest be simple or compounded?

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[29] [1986] B.C.D. Civ. 2058-02 (B.C.S.C.).

It is not proposed to deal with the first question at this point in the Report. Where a second rate might be required is the case where loss is assessed in trial date dollars and no claim for loss of value ought to be maintained. That possibility is discussed in Chapter VIII of this Report.

2. A Fluctuating Rate of Interest?

Schemes which embody a statutory interest rate are sometimes criticized because they cannot adequately reflect the fluctuation of market interest rates. The Manitoba Law Reform Commission commented:[30]

> The Commission has concluded that the use of a constant rate of interest may result in an inaccurate assessment of the loss which prejudgment interest attempts to repair. . .
>
> Given the fluctuation and the acceleration of Canada's inflation rate, a constant prejudgment interest rate fixed throughout the duration of a legal dispute will not necessarily accommodate the actual decline in the value of money from the date loss was incurred to the date of judgment, a period of time which may extend to several years.

The criticism levelled at constant rates of interest by the Manitoba Law Reform Commission is sound. If the new legislation were to fix a specific rate, or even a range of rates, there is every likelihood that the volatility of modern interest rates would soon render it obsolete.

Our Working Paper prompted one correspondent to suggest that the rates of court order interest simply be set by regulation. We see two objections to this. First, it would create both the appearance and substance of putting the Province in a position of conflict. The Province is a frequent litigant and its interest in the rate is obvious. Second, requiring fresh regulations to alter prejudgment interest rates would inevitably result in delay. The utility of requiring the constant revision of the governing legislation or regulations may be doubted. It would be more economical to identify a suitable indicator and permit reference to it to determine the appropriate rate of prejudgment interest.

The question of how often the rate of prejudgment interest should fluctuate depends to some extent on which indicator is chosen. It is clear, however, that the rate of prejudgment interest should not be constant. Nor is averaging a fluctuating market rate of interest sufficiently accurate, particularly in view of the simpler method of calculation contemplated by the multiplier scheme recommended in Chapter XIII.

Our conclusion is that the New Act should establish a method of determining a rate of prejudgment interest which will permit it to fluctuate in a manner which reflects economic conditions during the period for which the rate is in force. In the next part of this chapter, we examine a number of indicators of market rates of interest, as well as a potential recommendation based on the analysis of interest rates advanced by the Manitoba Law Reform Commission. This discussion focuses on the appropriateness and implications of adopting each indicator.

3. The Rate of Prejudgment Interest

There are two fundamentally different approaches to establishing an interest rate. The first is based on the view that the proper role of prejudgment interest legislation is to guarantee to the plaintiff that, at the minimum, he will receive a judgment which preserves the value of the money due plus a reasonable return that might have been earned had it been invested. If this

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[30] Manitoba Law Reform Commission, *Report on PreJudgment Compensation on Money Awards: Alternatives to Interest*, (Report No. 47, 1982) at 21 *et seq.*

view is accepted, the question which must then be answered is what interest rate will achieve that end. It would be irrelevant whether that rate accurately reflected market interest rates.

The Manitoba Law Reform Commission identified a manner in which such a "fair" interest rate could be set. It recommended that prejudgment compensation be calculated by determining the decline in the value of money during the prejudgment period converted to a percentage, and a further sum representing the real rate of return. The former figure was calculated with reference to the Consumer Price Index, All Items (Canada); the latter was fixed at 3% — the historical real rate of return. It is relatively easy to combine these two figures and treat them as the interest rate to determine the compensation recoverable by the plaintiff for the prejudgment period, or a portion of the prejudgment period.

The second approach adopts, in essence, the judgment of Taylor J. in *Gillis* v. *Bates*. In that case, it was held that the court's task was to establish the rate payable on safe, short-term investments in the marketplace. Underlying this approach is the assumption that the plaintiff is to be put in the position he would have occupied if he had a sum of money to invest in a prudent fashion. The defendant is treated as if he had so invested. The plaintiff foregoes any extra income he might have earned from more speculative investments. The defendant is assured that he will not be charged significantly more by way of prejudgment interest than he could have earned with the funds on deposit. He can therefore "hedge."

A number of different rates and their suitability as the appropriate indicator of a prejudgment interest rate are examined below. The relevant criteria are:

1. relationship between the rate and inflation,
2. reliability of information respecting the rate,
3. accessibility of timely information respecting the rate.

All the market rates discussed are those associated with "safe" investments.[31]

4. Comparing Various Rates of Interest

For the purposes of this Report, the following rates were examined:

(i) *The Inflation Rate*

The rate of inflation as measured by the Consumer Price Index (Canada), All Items, was converted to a percentage figure, calculated quarterly. This permitted market rates to be compared to the incidence of inflation in order that the adequacy of a particular market rate could be determined.

(ii) *An "Artificial" or "Construct" Rate*

To determine this rate, the rate of inflation was expressed as a percentage and added to the real rate of return, set at 3.5%. This rate was calculated quarterly and semi-annually.

(iii) *The Rate Payable on Banker's Acceptances*

Banker's acceptances are commercial credit devices used to secure payment in a number of transactions — notably sale of goods. This rate is a true commercial rate. It is reported on a weekly and monthly basis by the Bank of Canada and may be

[31] Although there are some arguments in favour of treating a lawsuit as a long-term, risky investment, it has been concluded that it would be wrong in theory to take that approach.

readily ascertained. On occasion, this rate is chosen in large financing transactions as an alternative to the prime rate.

(iv) *The Rate Payable on 90 Day Commercial Paper*
This is the rate which would be chosen most often if *Gillis* v. *Bates* were relied on consistently. It is the definitive short-term, safe investment. It may be ascertained from the Bank of Canada Review, which is published monthly.

(v) *Chartered Bank Rate on Prime Business Loans: The "Prime Rate"*
Each chartered bank in Canada is, of course, free to set its own rate on prime business loans. For the purposes of comparison, the rate set out in the Bank of Canada Review has been used. The prime rates set by the largest chartered banks in Canada tend to be identical.

(vi) *Registrar's Rate on Default Judgments/ Rate Paid on Funds in Court*
Both these rates are based on the prime rate charged by one particular chartered bank.[32] Rule 58(5) of the Rules of Court sets the rate on funds held in court at 2% below that bank's prime rate. It is the practice of the registrar when setting the rate of prejudgment interest on default judgments to adopt the rate on funds in court, rounded to the nearest whole number.

5. A Rate Not Compared

The Bank of Canada Review which was the source of our information on market rates, also lists a "bank rate." This rate is paid by the major chartered banks to the Bank of Canada for short-term (often overnight) advances. It is set 25 basis points above the rate established for 90 day treasury bills, issued by the Federal government on a weekly basis. As such, it is not in essence a market rate of interest. It may nevertheless be readily ascertained. It is announced every Thursday by the Bank of Canada.

The Ontario *Judicature Act*[33] formerly provided for prejudgment interest calculated at the "prime rate." This Act was replaced by the *Courts of Justice Act, 1984*[34] which adopted the bank rate. The reason for this change was explained in a "Ministry Commentary":[35]

> The new Act bases its interest provisions on the bank rate, instead of on the prime rate. Difficulties were encountered using the prime rate because the *Bank of Canada Review* is not published until some time after the prime rates are set. The bank rate, however, can be determined immediately.

We do not think that the bank rate is a suitable candidate. It is not a true market rate, since it does not correspond to any rate payable by or to litigants. Instead, it is based on weekly auctions of treasury bills. This represents, in effect, the cost of borrowing by the federal government.

The objection that the prime rate is not conveniently determined is a serious one. The problem lies in the reliance on the Bank of Canada Review to determine the prime rate. A more convenient means of ascertaining the prime rate may, however, be available. We return to this point below.

6. Determining the Appropriate Rates

A fuller appreciation of the relationship between each of the interest rates and inflation, came from a graph which was prepared charting the rise and fall

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[32] The Canadian Imperial Bank of Commerce. *See* n. 36, *infra*.
[33] R.S.O. 1980, c. 223, s. 36, 37.
[34] S.O. 1984, c. 11.
[35] Reproduced in Holmstead and Watson, *Ontario Civil Procedure, Vol. 1* at C.J.A. 158.

of the various interest rates, as well as the rate of inflation. This graph proved very useful, and has permitted us to arrive at the conclusion that, in principle, prejudgment interest should be paid at the prime rate. The reasons underlying this conclusion follow.

A chief concern in establishing a rate of interest is that it consistently yield a return which exceeds the rate of inflation, and which provides some modest return on a notional investment. An "artificial" rate of interest, calculated at the rate of inflation plus 3.5% by way of a real return, certainly achieves that end. Nevertheless, it has two principal drawbacks. First, it does not behave in a manner which corresponds, even roughly, to market rates.

The second drawback is more fundamental. Inflation, as measured from month to month, is subject to wild swings. For example, at the third quarter of 1978, it ran at close to 15%, while in the fourth quarter of that year, it dropped to approximately 3¾%. An artifical rate would be subject to similar, unpredictable variations. The result would be difficult to justify and impossible to predict.

The rate paid on bankers' acceptances and the rate paid on 90 day commercial paper were also attractive initially. While in recent years these rates have kept pace with inflation, in some years rates well below inflation have been recorded. A prudent investor who wished to keep his investments liquid might accept such returns over the short-term, but it is not clear that the concept of liquidity is of importance to the average plaintiff.

The manner in which the rate of interest payable on default judgments is set ensures that it will keep roughly the same relationship to prime rates as do funds paid into court. Since these rates were linked to prime, they have kept ahead of inflation although in some quarters, the real return was minimal. The issue in adopting these rates turns on the fairness of limiting the plaintiff to prime minus 2%. This does not correspond to any market rate. Unlike funds in court, there is no question of administrative costs properly reducing the plaintiff's net return. It seems fairer, therefore, that if the rate of prejudgment interest is to be linked to the prime rate, it should be without a deduction of this magnitude.

The prime rate charged by banks to their most creditworthy customers has a number of attractions. It responds quickly to changes in the marketplace and in inflation. For the most part, it has kept pace with inflation and afforded a modest to substantial real return on investment. The rate is familiar to laymen, and is for that reason, relatively easy to justify.

A significant drawback to this rate arises if the Bank of Canada Review is relied upon as a source. This reliance is, however, unnecessary. Prime rates set by various chartered banks are usually constant from bank to bank. It is difficult to see any differences which may arise from time to time as significant. No particular prime rate is any more or less fair than another. This suggests that it would be appropriate to set the rate of prejudgment interest with reference to the prime rate charged by any one of the large Canadian chartered banks.

For some years the rate on funds in court, and that payable on default judgments, have been set with reference to the prime rate charged by one particular chartered bank. No complaints have been directed to us respecting this practice. It is one which might usefully continue, with some modification.[36]

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[36] The particular chartered bank referred to is the province's banker (currently the Canadian Imperial Bank of Commerce). It should be emphasized that the reference to the province's banker is merely a way of singling out a particular chartered bank whose prime rate could be a reference point. A number of our correspondents were concerned that we were adopting the interest rate which might be payable by the Province as a borrower — one unavailable to other less economically powerful entities. That is not the case. Reference to the "prime lending rate of the banker to the government" is also found in the *Court Order Interest Amendment Act, 1982*, S.B.C. 1982, c. 47, s. 7(1). "Banker to the government" is left undefined in these enactments.

Prime rates vary at irregular intervals. The rate chosen by chartered banks reflects a wide range of economic and commercial considerations. Ideally, prejudgment interest should be payable at the prime rate in effect from time to time, rather than linking it to the rate which happened to be in effect at some point in any particular fixed period. Taking that step would increase the complexity of calculating prejudgment interest and for that reason, it has been rejected. Nevertheless, the rate in effect should not apply for any period longer than is consonant with ease of calculation. Given the method of calculating judgment interest adopted in Chapter XIII, it is possible, as well as desirable, to adjust the statutory rate of prejudgment interest monthly.

The Commission recommends:

4.(1) The rate of prejudgment interest should be based on the prime lending rate charged on loans to its most creditworthy borrowers by the banker referred to in Rule 58(5) of the Rules of Court.

(2) The rate of prejudgment interest should be determined monthly.

F. Should Prejudgment Interest be Compounded?

Section 2 of the *Court Order Interest Act* provides the court shall not award interest on interest. The effect of this prohibition is twofold. First, it prevents the court from ordering the payment of compound interest.[37] Second, a judgment on amounts which are attributable solely to interest will not attract prejudgment interest.[38] The need for the second prohibition is doubtful, since the Act does not apply where the parties have an agreement about interest. The issue raised by the compounding of interest, however, is fundamental.

In the Working Paper the Commission set out its unanimous view that, in theory, the compounding of prejudgment interest is desirable.[39] It reflects more accurately the operation of the marketplace and more fully and accurately measures the cost of delay to the successful plaintiff. We acknowledged, however, that in most jurisdictions where this issue has been considered, it was concluded that the introduction of compounding into prejudgment interest legislation would present formidable difficulties.[40] We went on to point out that those difficulties are really associated with the manner in which prejudgment interest is presently calculated and suggested that the use of the multiplier system would simplify those calculations enormously. We therefore proposed that, as a matter of principle, prejudgment interest should be compounded and called for comment on that proposal.

This proposal formed the focal point of a review of the Working Paper which was published recently in the Canadian Bar Review. In "The Law of Interest: Dawn of a New Era?" Messrs. Roger Bowles and Christopher Whelan, two English scholars with a particular interest in law and economics, strongly endorsed this proposal:[41]

> The claim that these proposals are revolutionary derives from the Commission's underlying approach, which entails a switch from simple to compound

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[37] *Tabata* v. *Argau*, (1984) 57 B.C.L.R. 273, 282 (B.C.C.A.). At trial it was held that this prohibition will not be circumvented by awarding a higher rate of simple interest: *Tabata* v. *Argau*, [1981] I L.R. 1-1304. *See also Brideau* v. *Brideau*, (1980) 78 A.P.R. 541, 32 N.B.R. (2d) 541, 547-8 (N.B.C.A.).

[38] *Shea* v. *Shea*, (1985) 33 A.C.W.S. (2d) 171(B.C.C.A.); *Lawson* v. *Utan Enterprises Ltd.*, [1980] B.C.D. Civ. 2058-03 (B.C.S.C.).

[39] Working Paper at 240.

[40] A notable exception being Alberta: *see Roman Catholic Diocese of Calgary Association for Senior Citizens* v. *Century Insurance Co. of Canada*, (1984) 8 D.L.R.(4d) 435 (Alta. C.A.). Compound interest was rejected in New Brunswick in *Sun Alliance Insurance Co.* v. *Alvin Keenan Ltd.*, (1985) 32 A.C.W.S. 254 (N.B.C.A.).

[41] (1986) 64 Can. B. Rev. 142, 143. *See also* Bowles and Whelan, "Compound Interest: Could Multipliers be the Way Forward?" (1986) 136 New L.J. 876.

interest. The Commission recognizes that the issue raised by compounding prejudgment interest is "fundamental". It acknowledges, unanimously, that compounding prejudgment interest is theoretically desirable in that it would more accurately reflect both the behaviour of investors in the marketplace and the cost of delay to successful plaintiffs. It also acknowledges that theory must be weighed against the practical difficulties of calculating compound interest. Most jurisdictions (the only exception cited is Alberta) have concluded that introducing compound interest would present formidable difficulties. Thus, the English Law Commission, in its Report on Interest published in 1978, claimed strong support for the retention of simple rather than compound rates. In that Report, and in the Working Paper which preceded it, little concession was made even to the theoretical desirability of compounding. Simple rates, it was asserted, were "better from the point of view of certainty, simplicity and consistency". The British Columbia Commission agrees with the conclusion that formidable difficulties have existed. But, in this Working Paper, it has made proposals which suggest that there exists a "considerably simpler method" of calculating, without difficulty, prejudgment compound interest at fluctuating rates. There is little doubt, moreover, that these new proposals are sufficiently well conceived and presented as to enable the assertion of the English Law Commission to be rejected with some confidence.

Their review continued:[42]

> The basic rationale for making an award of interest is simply that the defendant has kept the plaintiff out of his money and should compensate him accordingly. This notion which is, at this abstract level, fully consistent with the principle of *restitutio in integrum* or making the plaintiff whole, has been articulated frequently but implemented effectively only rarely. For the plaintiff can only be described as being restored to the position he could have occupied if the arrangements as to interest do genuinely restore him to a position comparable with the one in which he otherwise would have found himself. The prohibition on the application of interest at compound rather than simple interest, which remains the general rule in many jurisdictions, does, however effectively prevent the achievement of the declared objective, as we have argued on a number of occasions in the past. . . .
>
> At higher interest rates, and in cases where the delay between the date of harm and the date of judgment is greater, the degree of "under compensation" becomes more acute. In earlier decades when interest rates were lower, the antipathy of courts and legislatures to compound interest (an approach which Ogus refers to as "a relic from the days when interest was regarded as necessarily usurious") was less problematic.
>
> But if higher interest rates have intensified the divergence of interest awards calculated at compound interest rates from those which simple interest rates generate, there has been a second development which makes the switch to compounding a straightforward matter. That development is the advance in computerization which makes the frequent recalculation of interest awards a relatively trivial activity.

Needless to say, these comments, and similar but less detailed observations from other correspondents, have reinforced our view that the compounding of prejudgment interest should be an essential feature of new court order interest legislation and we so recommend.

The Commission recommends:

5.(1) The prohibition on awarding "interest on interest" should not be carried forward into the New Act.

(2) Under the New Act, prejudgment interest should be compounded.

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[42] *Ibid.* at 144.

CHAPTER IV THE RUNNING OF TIME

A. Introduction

The *Court Order Interest Act* requires that interest on all claims except those for special damages, be calculated "from the date on which the cause of action arose to the date of the order."[1] The court has no discretion to calculate prejudgment interest from any other date.[2]

In the case of special damages, the *Court Order Interest Act* adopts a different approach. Subsections 1(2) and (3) provide:

> (2) Notwithstanding subsection (1), where the order consists in whole or part of special damages, the interest on those damages shall be calculated
>
> (a) on the total of the special damages incurred in the 6 month period immediately following the date on which the cause of action arose; and
>
> (b) on the total of the special damages incurred in any subsequent 6 month period,
>
> from the end of each 6 month period in which the special damages were incurred to the date of the order.
>
> (3) For the purpose of calculating interest under subsection (2), and notwithstanding subsection (2), where the date of the order occurs
>
> (a) before a date 6 months after the date on which the cause of action arose; or
>
> (b) after the end of a 6 month period but before the end of the subsequent 6 month period,
>
> interest shall be calculated from the date on which the special damages were incurred to the date of the order.

This approach is adopted because special damages often represent outlays or losses occurring throughout the prejudgment period.

Subsection 1(2) requires the 6 month periods to commence on the date "immediately following the date on which the cause of action arose." This leaves open the possibility that the period immediately preceding the date of judgment may not fall wholly within a complete six month period. In such a case, subsection 1(3) requires interest to be calculated on each item of special damage from the date on which it was incurred. These provisions have caused little difficulty in practice.[3]

B. The Running of Prejudgment Interest on Damages

A persistently debated issue respecting the calculation of interest is when interest should begin to accrue. The British Columbia view that interest should run from the time the cause of action accrues has not been universally

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[1] Section 1(1). In one response to the Working Paper, concern was raised that the decision of the Supreme Court of Canada in *Kamloops* v. *Neilson*, [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1 had introduced an element of uncertainty respecting the accrual, for limitations purposes, of causes of action and, hence, the time at which prejudgment interest would commence to run. That decision has since been considered by the British Columbia Court of Appeal in *Bera* v. *Marr*, (1986) 1 B.C.L.R. (2d) 1. In that decision, *Neilson* is explained and the difficulties of concern to our correspondent are unlikely to arise.

[2] Even so, on occasion British Columbia courts have purported to exercise such a discretion, although without reference to the strictures of the *Court Order Interest Act*. In *K.R.M. Construction Ltd.* v. *B.C. Ry. Co.*, (1982) 40 B.C.L.R. 1 (B.C.C.A.), the Court of Appeal noted the mandatory nature of the *Court Order Interest Act* (at 35) and then, somewhat inconsistently, approved a method of calculating past pecuniary loss not permitted by the Act (at 37-38). In *Allen* v. *The New Naked Spud Drive-In Ltd.*, (1980) 18 C.P.C. 251 (B.C. Co. Ct.) prejudgment interest on a default judgment was awarded from the date of service of the writ, since the endorsement did not indicate when the debt came due. In *Nitschke* v. *McInnes*, [1982] B.C.D. Civ. 2058-19 (B.C.S.C.), the evidence at trial did not establish when the debt came due and, accordingly, prejudgment interest was held to run from the latest date on which the principal sum could have become due and payable. Notwithstanding the express wording of s. 1 of the *Court Order Interest Act*, in *Thorsell* v. *Hoem*, (1984) 54 B.C.L.R. 35, 51 (B.C.S.C.), a number of different dates were chosen. The accident in question took place on June 16, 1979. Prejudgment interest was ordered to run on non-pecuniary loss from June 16, 1979; on past wage loss from April 1, 1983; on special damages from July 1, 1980 and April 1, 1982, and on damages for loss of services from October 1, 1979 and, in part, from February 1, 1983. *Cf. Virtue* v. *United Realty Ltd.*, [1985] B.C.D. Civ. 3799-01 (B.C.S.C.).

[3] But in *Suttie* v. *Metro Transit Operating Co.*, (1986) 2 B.C.L.R. (2d) 145 (B.C.C.A.), Hutcheon J.A. ordered that in a 14 month pre-trial period, the first 6 month period not commence until 2 months after the cause of action arose. This result is not authorized by section 1 of the Act.

adopted. In many jurisdictions interest runs from some later point in time, either as a result of judicial decisions or according to the terms of the enabling legislation. In those jurisdictions, the guidelines laid down by the English Court of Appeal in *Jefford* v. *Gee*[4] have been most influential.

On the running of interest in personal injury cases, Lord Denning M.R. suggested:[5]

> When the compensation payable to a plaintiff is not for actual pecuniary loss but for continuing intangible misfortune, such as pain and suffering and loss of amenities (which cannot fairly be measured in terms of money) then he should be awarded interest on the compensation payable. But such interest should not run from the date of the accident: for the simple reason that these misfortunes do not occur at that moment, but are spread indefinitely into the future: and they cannot possibly be quantified at that moment, but must of necessity be quantified later. . . . The court always awards compensation for them in one lump sum which is by its nature indivisible. Interest should be awarded on this lump sum as from the time when the defendant ought to have paid it, but did not: for it is only from that time that the plaintiff can be said to have been kept out of the money. This time might in some cases be taken to be the date of letter before action, but at the latest it should be the date when the writ was served. . . . From that time onwards it can properly be said that the plaintiff has been out of the whole sum and the defendant has had the benefit of it. Speaking generally, therefore, we think that interest on this item (pain and suffering and loss of amenities) should run from the date of service of the writ to the date of trial. This should stimulate the plaintiff's advisers to issue and serve the writ without delay — which is much to be desired. Delay only too often amounts to a denial of justice.

Lord Denning's choice of the date of service of the writ was subjected to trenchant criticism which, in 1973, this Commission found persuasive, and which bears repeating:[6]

> While the court has decreed that interest on special damages will run as from the date of accident, it has said that this date cannot be the starting date for interest on pain and suffering. The court gives as its reason the fact that the misfortunes arising from the physical injury do not belong to the time of the accident but are spread indefinitely into the future and must by their nature be quantifed later. They also quote again the *ex mora* principle that interest should only run on the lump sum as from the time the defendant ought to have paid, but did not.
>
> Having said all that, the court went on to say, with a logic which is difficult to understand, that the effective or starting date in some cases will be the date of the letter before action, but in no case should it be later than the date of the service of the writ. One might imagine from this that there is some *mystique* connected with the making of a claim or the serving of a writ which enables a defendant immediately to quantify the value of the plaintiff's claim for damages, but everyone knows that this is not so. But if the reasoning of the Court of Appeal is to be considered seriously, then the court appears to think that although a pain and suffering claim cannot possibly be valued at the date of the accident, it *can* be valued at the date of the letter of claim or *at the latest* at the date of the service of the writ. The fallacy in this reasoning is evident: given an intelligent plaintiff and a competent solicitor, the writ can be issued and served the day after the accident!
>
> Why was this date (the date of the service of the writ) chosen ultimately by the court? The answer appears from a later paragraph in the judgment which was to the effect that the use of that date will "stimulate a plaintiff's advisers to issue and serve the writ without delay."
>
> While one may, with every justification, ask, what the stimulation of the plaintiff's solicitors has to do with an award of interest to a plaintiff, the effect of such a direction can only be to force a plaintiff's solicitor to issue proceedings at a very early date, to the very probable detriment of negotiations for a settlement and with the inevitable result of adding substantially to the cost of these actions. Applications for legal aid will multiply alarmingly and, even supposing the action

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[4] *Jefford* v. *Gee*, [1970] 2 Q.B. 131, [1970] 1 All E.R. 1202 (C.A.).

[5] *Ibid.* at 147.

[6] J. Walker, "Interest on Damages," (1970) 120 New L.J. 308, 309-10. Similar arguments persuaded Hoyt J. of the New Brunswick Court of Queen's Bench to reject the date of service of writ rule: *Janossy* v. *Hudson*, (1982) 100 A.P.R. 150, 38 N.B.R. (2d) 150, 154-5.

lies dormant after the writ has been served, all that will have been achieved will be an increase in costs. This is a proposition which can only result in trouble and unnecessary cost. It reveals, it is submitted, a lack of knowledge on the part of the Court of Appeal of the lengthy negotiations which go on, prior to action, between the parties' advisers and which result, as was found by the Winn Committee, in the settlement *without litigation* of about 80% to 90% of this type of case. Very few cases indeed will now be settled without the issue of proceedings.

Arguments continue to be raised in the cases to justify a later date for the running of interest.[7] The perceived unfairness of imposing prejudgment interest on a defendant who is unaware of a claim in tort, is unable to quantify it, or who does not expect a claim for interest, are all cited in this context.[8] The arguments raised in these cases parallel those advanced in favour of a general discretion which were discussed earlier in this Report.[9] Questions of delay or difficulty in assessing liability or *quantum* carry no greater weight in this context. They do not justify the discretion to vary the date from which prejudgment interest should run.

We do not, therefore, see any basis for a significant departure from the general rule that prejudgment interest runs from the time the cause of action arises. We do, however, feel that two exceptions are called for. The first, and most obvious, is where a pecuniary loss occurs at a later date. The Act currently characterizes such losses as "special damages"[10] and specific rules concerning the accrual of interest are provided.[11]

The second exception is where damages are assessed with reference to a later date. Most claims for liquidated sums will arise at a time certain. In cases involving unliquidated claims, however, often the value of a loss may be assessed at a date other than the date the cause of action arose.[12] This point may be illustrated with reference to some paradigms provided by a correspondent:

1. A stockbroker wrongfully converts his client's shares on January 1, 1983. At that date they were worth $5.00. By June 1, 1983, they reach $20.00. By January 3, 1984, the date of trial, they are at $10.00. If the shares were purchased for $1.00, then the loss may be valued at $4.00, $19.00 or $9.00 per share, or at some figure in between. If the figure of $20.00 is chosen, then it must be on the theory that the plaintiff would not have taken his profit prior to June 1, 1983. To award interest on the $19.00 from the date the cause of action arose would result in a significant overcompensation.
2. A vendor sells a defective product to a purchaser. Three years later, the product causes loss. The purchaser sues for breach of contract. Damages are assessed, *inter alia*, for value of the goods three years after the purchase. Should interest be awarded from the date of the sale?[13]

A mandatory requirement that interest be awarded from the date the cause of action arose may not be sufficiently sensitive to the temporal aspects of calculating the plaintiff's pre-trial loss. Given the wide variety of fact patterns in which problems of this kind might arise, attempting to prescribe set rules to govern the running of interest is difficult. In the type

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[7] *See* the Working Paper at 111, 112.

[8] *See, e.g., Walker* v. *Sydney City Hospital*, (1983) 55 N.S.R. (2d) 556, 114 A.P.R. 556 (N.S.C.-T.D.); *Dugdale* v. *Boissneau*, (1982) 26 C.P.C. 138 (Ont. H.C.), *rev'd* (1983) 41 O.R. (2d) 152 (Ont.C.A.), leave to appeal refused (1983) 20 A.C.W.S. (2d) 65 (S.C.C.); *Morrison* v. *City of Edmonton*, (1982) 137 D.L.R. (3d) 174 (Alta. Q.B.).

[9] *See* Chapter II.

[10] *See* the discussion in Chapters V and VI.

[11] Subsections 1(2), 1(3).

[12] *See, e.g.*, J. Irvine, "*Annotation to Dominion Securities Ltd.* v. *Glazerman*," (1984) 29 C.C.L.T. 194; *Anadell* v. *Crowther*, (1984) 55 B.C.L.R. 216 (B.C.C.A.).

[13] *See, e.g., Ford Credit Canada Ltd.* v. *Fahl*, (1985) 61 B.C.L.R. 47 (B.C.S.C.) in which an analogous issue arose, but the parties did not apparently recognize the problem discussed here; and *Cornell Chevrolet Oldsmobile Ltd.* v. *Copp*, [1985] B.C.D. Civ. 3475-01 (B.C.S.C.), in which prejudgment interest was held to run from the date each item of loss was quantified.

of case described above a judicial discretion to choose a different date would appear to be the most satisfactory approach.[14]

The Commission recommends:

6.(1) The New Act should carry forward the general principle that prejudgment interest runs from the date the cause of action arose.

(2) The court should not be bound to award prejudgment interest from the date the cause of action arose where the whole or part of an unliquidated claim for pecuniary loss is assessed with reference to a later date.

(3) In the circumstances described in paragraph (2), the court should have a discretion to set a date from which prejudgment interest runs.

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[14] Some British Columbia courts already adopt this approach, although it is inconsistent with the Act. *See: Briser* v. *A Law Firm*, (1984) 53 B.C.L.R. 305 (B.C.S.C.), and *Kemp* v. *Lee*, (1985) 58 B.C.L.R. 219 (B.C.C.A.). In *Mabrodiam Diamond Importers* v. *Orin's Jewellers Ltd.*, [1981] B.C.D. Civ. 2058-06 (B.C.S.C.), damages were assessed at the date of trial, but the issue of how prejudgment interest was to be assessed did not arise, because counsel had agreed on a "weighted average" of 10%. *Cf. Boxer* v. *Reesor*, (1984) 55 B.C.L.R. 385 (B.C.S.C.) in which damages were calculated in respect of a share transaction from the date of mitigation. It is not clear from the reasons for judgment how court order interest was calculated.

CHAPTER V THE TEMPORAL APPORTIONMENT OF LOSS

A. Introduction

Recent decisions of the Supreme Court of Canada, require the detailed calculation of losses in personal injury and fatal accident cases. Before those decisions, most awards of damages were "global." Awards were not broken down into their component parts, and little effort was devoted to distinguishing between losses arising before or after the date of judgment. Damage suffered by the plaintiff was regarded as a capital loss arising at the time the injury occurred, even though the value of that loss was calculated with reference to a continuing stream of income or expenses extending into the future.[1]

The need to identify the point in time at which loss arises is intensified by statutes providing for prejudgment interest. The prime justification usually advanced for awarding prejudgment interest is that the plaintiff has been kept out of money which in fairness should have been paid to him at some point prior to judgment. To award prejudgment interest on losses which arise after the date of judgment is obviously inconsistent with this rationale. The plaintiff has not been kept out of money; quite the contrary, he has received it in advance. If this argument is accepted, then the court should be directed to apportion all losses into past and future components. Only the sum of money compensating the plaintiff for past loss would attract prejudgment interest.

The *Court Order Interest Act* adopts this view in part. Section 2(2) of the Act provides that:[2]

> 2.(2) The Court shall not award interest under Section 1
> (a) on that part of an order that represents pecuniary loss arising after the date of an order.

The Act imposes no similar restriction on awards of prejudgment interest for non-pecuniary loss. In respect of that type of loss, the effect of section 1 of the Act is that interest must be awarded running from the date the cause of action arose. No account is to be taken of the possibility that an award of damages for non-pecuniary loss might include a component respecting future loss.[3]

An obvious question therefore arises concerning the distinction between "pecuniary" and "non-pecuniary" loss. In our *Report on Compensation for Non-Pecuniary Loss*, the distinction between pecuniary and non-pecuniary loss was explained in the following terms:[4]

> Damages may be divided into two general categories. The first category of damages provides compensation for expenses incurred as a result of the defendant's actions, or for expenses likely to arise in the future. These may include injuries to property, doctor's bills, the costs of hospitalization and lost income. These losses are generally referred to as "pecuniary loss." The second category of damages provides compensation for injuries which do not directly touch the plaintiff's pocketbook. These include loss of capacity to enjoy life, diminished life expectancy, and pain and suffering. Often these kinds of losses are referred to as "loss of amenities," or as "non-pecuniary loss."
>
> It is relatively easy to measure pecuniary loss. A person injured in an accident may not have been able to work for several months. Part of his damages should compensate for those lost wages. Maybe he will never work again. Then the courts must resort to actuarial evidence in order to calculate the present value

[1] This characterization is still occasionally utilized in British Columbia, even though the recurring nature of awards compensating for damage such as lost income is expressly recognized by statute. *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51. *See, e.g., Cail* v. *Hawick*, [1984] B.C.D. Civ. 3388-11 (B.C.S.C.).

[2] In Ontario, a similar rule prevails as a result of the exercise of judicial discretion: *Brown* v. *Zaljun*, (1985) 32 A.C.W.S. (2d) 449 (Ont. Dist. C.)

[3] *Jenner* v. *Koller*, (1982) 22 C.P.C. 168 (B.C.S.C.).

[4] LRC 76, 1984 at 1.

of the lost income, but the award to compensate for that loss, although not precise, is generally quantifiable. Medical expenses up to the date of the hearing are easy to assess. Costs of future care are more difficult, but again, the award can be based upon reasonable assumptions and projections.

Non-pecuniary loss cannot really be quantified. Perhaps the plaintiff has lost an eye or a limb. Perhaps he has suffered paralysis or brain damage. Difficult problems are presented by injuries which do not immediately affect the plaintiff. The loss of one eye, lung or kidney may be painful and debilitating, but is not necessarily disastrous until the other eye, lung or kidney is impaired, something which may or may not occur in the future. It is impossible to say what amount of money will compensate the plaintiff for these kinds of losses. They cannot be accurately quantified.

B. Apportionment and the Practice of Discounting

Judgments are, with rare exceptions, once and for all. All present and future loss must be calculated and compensated for in a single order. This results in the capitalization of many losses which are referable in whole or in part to the post-judgment period. Calculating the value of future lost income is inherently imprecise. It involves predicting future economic trends and the plaintiff's economic performance in the marketplace.

Two different approaches to calculating the capitalized value of a future stream of income or expense have been identified by Commonwealth courts. The first approach is to calculate the value of the lost income stream from the date the cause of action arose. When this approach is adopted, the loss is not divided into past and future components. Courts using this approach do not ignore the fact that viewed from the date of trial, at least a portion of the capital sum may reflect loss that will accrue after the trial. This is reflected by a reduction in the capital sum required to produce that income stream. In other words, while the future loss will attract interest, its capitalized value is correspondingly reduced to account for early receipt. This approach corresponds with the view that income loss is capital in nature.

The second approach corresponds more closely with the view that the plaintiff has lost an income stream. So far as that stream was lost prior to trial, it may be reduced to a single figure, calculable with some precision. When those calculations are made, it is appropriate to speak of a "past pecuniary loss," i.e., money which the plaintiff has not received, and on which prejudgment interest should be paid. It is also appropriate to treat future loss in a different manner. It ought to be discounted (to the date of the order) to reflect its early receipt. There is, however, no need to add prejudgment interest to it. The basis on which the capital value of the damages compensating the plaintiff for future loss is calculated assumes that he will be paid forthwith. The plaintiff will then be in a position to invest the capitalized sum in a manner which will yield the predicted future stream of income. To award prejudgment interest on the future component would distort the actuarial calculations on which the capitalized value of the future loss is based. It would give the plaintiff more money than is required to make him whole.

The argument that future loss ought not to attract prejudgment interest is irrelevant to the consideration of how prejudgment interest is to apply to a discounted award. The issue is no longer merely whether a future pecuniary loss should attract interest. If a loss is discounted to the date the cause of action arose, then it is true that prejudgment interest will be assessed on some portion of the judgment representing future loss. However, the principal sum on which prejudgment interest has been calculated has been reduced to take that into account. Accordingly, the mere fact that future losses attract prejudgment interest is not unfair in itself.

C. The Temporal Apportionment of Loss in British Columbia

1. The Structure of the *Court Order Interest Act*

While the manner in which prejudgment interest is to be calculated presents little difficulty in theory, many British Columbia courts have experienced difficulty in practice. The result has been a degree of confusion. Much of this confusion is caused by the wording of the Act.

The *Court Order Interest Act* employs a number of technical terms to describe various types of loss. It refers to "pecuniary loss" and "special damages." By implication, therefore, the Act also recognizes the existence of "non-pecuniary loss" and "general damages." Section 2(a) of the *Court Order Interest Act* further qualifies the term "pecuniary loss" by the phrase "arising after the date of the order."

Section 1(2) of the *Court Order Interest Act* requires "special damages" to be allocated to a particular six month period. Interest does not begin to run on such loss until the end of the six month period in which it was incurred.

A review of this Commission's 1973 Report indicates that the reason for creating specific rules to govern "special damages," rather than merely referring to pecuniary loss, did not turn on the Commission's general conclusion that *any* future economic loss ought not to attract prejudgment interest.[5] Instead, the Commission's recommendation was a response to the need to adjust the basis on which prejudgment interest is calculated in respect of *past* losses.[6] It follows that items of loss falling within the category of "special damages" must be divided into pre and post judgment components. The future component does not attract prejudgment interest. The past component does attract prejudgment interest, but must be allocated to a particular six month period for the purpose of calculating it.

What is the status of "pecuniary loss" which does not fall within the term "special damages?" Such losses may, but need not, be characterized as "general damages." In this context, "general damages" is the broader term, since it includes non-pecuniary loss. Since the Act does not define "general damages," the application of the Act in this respect depends on whether the category of general damage to be considered is characterized as "pecuniary" or "non-pecuniary" loss.

Section 2 prohibits an award of prejudgment interest on pecuniary loss "arising after the date of the order." It follows that pecuniary loss must be apportioned into past and future components, and interest paid on the past component only. The use of this terminology implies that any form of past pecuniary loss which cannot be characterized as "special damages" will attract prejudgment interest from the date the cause of action arose. It will not be subject to accumulation and allocation to a six-month period.

The other category of loss contemplated by the *Court Order Interest Act* is non-pecuniary loss. Since the Act is silent on the way in which prejudgment interest is to be calculated on this loss, the general provisions of subsection 1(1) of the Act apply and it would appear that the whole sum awarded under this head should attract prejudgment interest from the date the cause of action arose.

2. Temporal Apportionment in the Courts

(a) Introduction

Courts in British Columbia have struggled with the relationship between the concepts of general damages, special damages, pecuniary loss and non-

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[5] *See* LRC 12 at 16-18.
[6] *Ibid.* at 21.

pecuniary loss. The phrase "pecuniary loss arising after the date of the order" has proved troublesome.[7]

At the time our Working Paper was issued the law governing the temporal apportionment of loss was confused and unsettled. This was particularly true with respect to losses in the nature of "income," in the broadest sense of that word. The courts vacillated between two views. The first is that since items of general damage are valued on a once-and-for-all basis as capital assets, the loss the award represents should be regarded as arising in whole at the time of the injury. The second view is that the award of damages replaces a stream of future income. Even in those cases which approved the temporal apportionment of all forms of pecuniary loss, the manner in which this was to be accomplished was an issue. The difficulty was compounded by the fact that distinctions were drawn between functionally similar types of "income stream" losses so that each developed its own jurisprudence with respect to the calculation of interest in isolation to the others.

Since our Working Paper was issued, two further decisions of the British Columbia Court of Appeal have emerged: *Baart* v. *Kumar*[8] and *Suttie* v. *Metro Transit Operating Co.*[9] Those cases have disspelled much of the uncertainty although it has not been eliminated entirely. While it is still instructive to examine the earlier British Columbia cases on this issue, in the light of this development we will do so in somewhat less detail than was carried out in the Working Paper.

(b) Non-Pecuniary Loss

Section 1(1) of the Act suggests that interest must be awarded on the whole of an award for non-pecuniary loss from the date the cause of action arose. This interpretation has not been much questioned in British Columbia, although in *Jenner* v. *Koller*,[10] an argument was advanced that damages for non-pecuniary loss ought to be apportioned. Mackoff J. declined to do so:[11]

> This argument is dealt with in *Jefford* v. *Gee*, [1970] 2 Q.B. 130 [1970] 1 All E.R. 1202 (C.A.) where Lord Denning M.R. speaking for the Court states at p. 1209:
>
> > "It is not possible to split those misfortunes (pain and suffering and loss of amenities) into two parts; those occurring before the trial and those after it. The Court always awarded compensation for them in one lump sum which is by its nature indivisible. . . ."
>
> I respectfully adopt that statement.

Lord Denning's *dicta* respecting the severability of non-pecuniary loss has not been universally accepted in the Commonwealth. In several Australian jurisdictions damages for non-pecuniary loss may be apportioned into past and future components.[12]

(c) Pecuniary Loss other than "Income"

(i) Money Expended Before Trial

In most cases, money expended before trial will constitute "special damages." No question of apportionment arises in such a case, since the loss is by its nature past loss. In this context, the question of what constitutes "special damages" for the purposes of the *Court Order Interest Act* is the

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[7] *See* F.W. Hansford, "The Application of the Court Order Interest Act to Various Heads of Damages," Damages 1984 (Continuing Legal Education Society of British Columbia).

[8] *Baart* v. *Kumar*, (1985) 66 B.C.L.R. 1 (B.C.C.A.).

[9] *Suttie* v. *Metro Transit Operating Co.*, (1986) 2 B.C.L.R. (2d) 145 (B.C.C.A.).

[10] *Supra*, n. 3.

[11] *Ibid.* at 169-170: to the same effect, *Spencer* v. *Rosati*, (1985) 1 C.P.C. (2d) 301, 306-7 (Ont. C.A.).

[12] The correctness of Lord Denning M.R.'s guidelines on this point was also questioned by Montgomery J. of the Ontario High Ct. in *Dugdale* v. *Boissneau*, (1982) 26 C.P.C. 138, 141, *rev'd* 41 O.R. (2d) 152 (Ont. C.A.); *cf. per contra Martin* v. *Cappucitti*, (1982) 18 A.C.W.S. (2d) 97 (Ont. H.C.) *per* O'Brien J.

difficult issue. The answer to that question determines the date from which interest will run. Later in this Report we note the difficulty courts have faced in characterizing loss as "special damage." Those difficulties, in part, lead us to conclude that the term should be excised from the Act.[13]

(ii) Money to be Expended After Trial

In commercial cases, it is well established that an expense which arises out of the plaintiff's breach of contract or negligence, but which has yet to be incurred, is a future pecuniary loss which does not attract prejudgment interest. In British Columbia, the leading case is *B.C.A.A.* v. *The Manufacturers Life Insurance Co.*[14] The defendant was the administrator of the plaintiff's pension plan. As a result of negligent actuarial advice given by the defendant, the plaintiff undertook to alter its pension plan and thereby became obliged to pay into the plan amounts substantially in excess of those predicted. At trial, the plaintiff argued that the whole loss (including the future expense) arose upon implementation of the scheme. This view was rejected. On appeal, the Court of Appeal agreed that the award ought to be apportioned into past and future components with regard to whether the expense had actually been incurred at the date of judgment. The mere fact that the expense was quantifiable prior to judgment did not change the character of the loss.[15]

In British Columbia, one particular type of future expense has been held to arise before judgment. In many personal injury cases, the plaintiff will need a specially designed residence, particular types of rehabilitative or supportive devices, or modified vehicles for transportation. The cost of supplying these "initial outlays," has been held to be general damage.[16] The leading case is *Louie* v. *Dick*[17] where the plaintiff was entitled to $75,000 in respect of items such as specialized accommodation, a customized van, and wheelchairs. No money had, in fact, been spent by the plaintiff to acquire these items. The issue was whether the $75,000 attracted prejudgment interest. It was held that it did:[18]

> I agree that where an amount can be identified as applicable to the period before trial, and where that amount ought to have been paid before trial, it is not a "pecuniary loss arising after the. . . order". That applies even where the amount has not been expended before trial. I reject the argument that unless initial costs have been expended, and therefore constitute special damages, s. 2 applies. "Pecuniary loss" and "experience" do not mean the same thing.

It is difficult not to sympathize with the result achieved in *Louie* v. *Dick*. The plaintiff had been kept out of something: the special facilities which would have made his life more bearable during the pre-trial period. These facilities are identified with the money that would have been required to obtain them. Had the plaintiff received "instant justice," or if the defendant had made an interim payment, the plaintiff would not have been deprived. Compensating the plaintiff for the delay he has suffered in obtaining relief and

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[13] *See* recommendation No. 9 *infra*.

[14] (1981) 29 B.C.L.R. 330 (B.C.C.A.).

[15] *Ibid.* at 338 *per* Seaton J.A. *See also Kemp* v. *Lee*, (1984) 28 A.C.W.S. (2d) 1987 (B.C.C.A.) and *C.R.F. Holdings Ltd.* v. *Fundy Chemical International Ltd.*, (1980) 21 B.C.L.R. 345, 14 C.C.L.T. 87 (B.C.S.C.) *per* Taylor J. to the same effect. Taylor J. was reversed in this case by the Court of Appeal on the basis that the wrong measure of loss had been used: (1982) 2 W.W.R. 385, 33 B.C.L.R. 291, 19 C.C.L.T. 263. His judgment that future expenses attracted no prejudgment interest was not the subject of comment. In *Kuriud* v. *Linestrom*, (1983) 30 R.P.R. 1 (B.C.S.C.), prejudgment interest on future expenses was also denied. In the case of *Dyform Engineering Ltd.* v. *Intup Hollowcore International Ltd.*, (1982) 19 B.L.R. 1 the British Columbia Supreme Court awarded prejudgment interest on future pecuniary loss on the ground that it had been discounted to the date of judgment. This would appear to be an error in principle. It is, moreover, inconsistent with Court of Appeal decisions in which it has been held to be incorrect to award prejudgment interest on future loss discounted to the date of judgment.

[16] *Louie* v. *Dick*, (1984) 39 C.P.C. 274 (B.C.S.C.); *Phurawd* v. *Banks*, [1983] B.C.D. Civ. 3391-01 (B.C.S.C.); Memorandum to Counsel, Oct. 31, 1983 (reproduced in *Louie* v. *Dick*); *Van der Est* v. *Albert*, cited in *Louie* v. *Dick*.

[17] *Ibid.*, followed in *Roberts* v. *Thibeault*, (1985) 65 B.C.L.R. 106 (B.C.S.C.).

[18] *Ibid.* at 277-278.

encouraging defendants to make interim payments are ends that are consistent with the awarding of prejudgment interest.

The correctness of *Louie* v. *Dick*, however, is weakened when tested against the hypothetical case of the plaintiff who has sufficient assets to make the initial outlays required without the defendant's assistance. It would be difficult to characterize this expenditure as anything other than special damage.[19] The plaintiff would be entitled to interest only from the end of the six month period in which the money was spent. Alternatively, if the money actually expended is regarded as general damage, then by reason of section 1(1) of the *Court Order Interest Act*, interest on the money must be awarded for the whole prejudgment period, notwithstanding that the plaintiff was not out of pocket until he expended the funds in issue.[20] It is difficult to see the fairness in giving the plaintiff who buys a customized van one week before trial one week's interest on the money he expended, but if he should wait until one day after trial, to award him interest for the whole prejudgment period.

The reasoning on which *Louie* v. *Dick* is based is unlikely to apply if the recommendations made in this Report are implemented by legislation. To arrive at the result in *Louie* v. *Dick*, legislation would have to make an exception for damages awarded in respect of "initial outlays." We have concluded that no such exception should be made.

All plaintiffs entitled to damages for "initial outlays" should be treated equally. If the expense is not actually incurred, such damage would in any event be assessed in trial date dollars. Accordingly, there is no need to compensate the plaintiff for loss of value. Nor is the loss of use of money of high importance in this context. What the plaintiff has lost is the use of the special equipment, vehicle, residence, or care. This is a matter which should more properly be reflected in his damages for non-pecuniary loss. It is not, in essence, a prejudgment interest problem.

Characterizing the plaintiff's deprivation as an element of non-pecuniary loss is not free of other difficulty. The law governing compensation for non-pecuniary loss is controversial. In particular, the limitation of the *quantum* of awards under this head of loss to $100,000, adjusted for inflation, has caused much debate. These issues were discussed at length in this Commission's *Report on Compensation for Non-Pecuniary Loss*, in which it was recommended that:[21]

> The rough upper limit on compensation for non-pecuniary loss established by the Supreme Court of Canada in the trilogy be abolished.

Implementation of this recommendation would enhance the power of the courts, when assessing non-pecuniary loss, to have regard to the plaintiff's deprivation of special facilities and amenities which would have made his life easier during the pre-trial period.

(d) Lost Income

(i) Introduction

In British Columbia, lost income has been traditionally viewed as a capital asset. When by reason of injury the plaintiff is unable to maintain his employment, he is said to have lost earning capacity, rather than a mere stream of income. As a result, in *Heltman* v. *Western Canadian Greyhound Lines*

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[19] *See Hope Hardware & Building Supply Co.* v. *Fields Stores Ltd*, (1982) 137 D.L.R (3d) 58 (B.C.C.A.); *see also Davies* v. *Safeco Insurance Co. of America*, (1982) 137 D.L.R. (3d) 66 (B.C.S.C.).

[20] A further difficulty in the approach in *Louie* v. *Dick* is that interest is awarded on a sum calculated in trial date dollars. This may substantially overcompensate the plaintiff.

[21] *Supra*, n. 4 at 31.

Ltd.,[22] the British Columbia Court of Appeal, in 1966, held that lost income was general damage, even though part of the loss occurred prior to trial. Valuing this capital asset with reference to the continuing stream of income the plaintiff might have expected to receive, but for the injury, did not change the fundamental character of the loss.[23]

The *Heltman* case was decided before two significant developments in the law of British Columbia. The first is the enactment of the *Court Order Interest Act* itself. The second is the increasing sophistication in the manner in which evidence is led in personal injury cases. As a result, courts no longer give single global judgments. Instead, awards are broken down into their component parts. This practice has the force of law. In particular, it is now common practice for courts to discount an award of damages to reflect the early receipt of a stream of income. The plaintiff receives a lump sum which, when invested, will yield a future stream of income intended to replace that lost as a result of the injury. The result is to mimic the lost income stream in both amount and time of receipt. The persuasive force of the *Heltman* case has lessened as a result of these developments.

The varying characterizations of lost income as general damage, special damage, pecuniary loss, and a capital asset have proved to be a major source of confusion in British Columbia trial courts. A number of possible interpretations of the Act and the relevant case law were advanced and authority can be found for numerous approaches. Still, the trend has been toward increasing sophistication in dealing with lost income.

(ii) Judicial Approaches to Lost Income

In the Working Paper the earlier jurisprudence was examined at some length and six evolutionary stages of the courts' approach to lost income were identified:[24]

(1) Lost income is general damage, arises in whole at the date of injury, and attracts prejudgment interest from the date the cause of action arose on the whole sum at full market rates.[25]

(2) Lost income is general damage, arises whole at the date of injury, and attracts prejudgment interest on the whole sum at a reduced rate.[26]

(3) Lost income is general damage, which nevertheless constitutes pecuniary loss arising in part after trial. It must for that reason be apportioned into past and future components. Prejudgment interest is payable on the past component from the date the cause of action arose at full market rates.[27]

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[22] (1966) 57 W.W.R. (N.S.) 449 (B.C.C.A.). *See also Cail* v. *Hawick*, *supra*, n. 1.

[23] In many Commonwealth jurisdictions, this view is not adopted and the past component of wage loss is regarded as special damage. *See, e.g., Jefford* v. *Gee*, [1970] 2 Q.B. 130, [1970] 1 All E.R. 1202 (C.A.); *Forbes Chevrolet Oldsmobile Ltd.* v. *Singer*, (1984) 44 C.P.C. 303 (N.S.C.C.).

[24] Working Paper at 152-160.

[25] This view conforms to the analysis put forward in the *Heltman* case, *supra*, n. 22.

[26] *Hine* v. *Bentley*, (1979) 14 B.C.L.R. 10 (S.C.B.C.); *Leischner* v. *West Kootenay Power & Light Co.*, [1982] B.C.D. Civ. 3385-07 (B.C.S.C.). *See also Webster* v. *Excelsior Life Ins. Co.*, (1984) 50 B.C.L.R. 381 (B.C.S.C.) in which the rate of prejudgment interest was adjusted to take into account commissions earned near the end of the prejudgment period. In the Working Paper at 153, 154, it was noted that this approach and the first had probably been overruled by *Robson* v. *Official Administrator, County of Cariboo*, (1979) 12 B.C.L.R. 208, 101 D.L.R. (3d) 306 (B.C.C.A.).

[27] A number of cases apportioned the loss but held that the past component continued to be general damage the whole of which attracted prejudgment interest from the date the cause of action arose: *Tweter* v. *Defrane*, [1983] B.C.D. Civ. 2058-04 (B.C.S.C.); *Lapierre* v. *Gerard*, [1981] B.C.D. Civ. 2058-11 (B.C.S.C.); *Bissky* v. *Trottier*, (1984) 54 B.C.L.R. 288 (B.C.S.C.); *Haggman* v. *Milligan*, (1984) 53 B.C.L.R. 312 (B.C.S.C.); *Fields* v. *Lloyd*, (1980) 21 B.C.L.R. 134 (B.C.S.C.); *Watson* v. *Jacobs*, [1984] B.C.D. Civ. 3388-10 (B.C.S.C.); *Walkom* v. *McGuckie*, [1985] B.C.D. Civ. 3389-10 (B.C.S.C.); *Rowe* v. *Cole*, [1985] B.C.D. Civ. 3388-12 (B.C.S.C.). *Cf. Thorsell* v. *Hoem*, (1984) 54 B.C.L.R. 35 (B.C.S.C.) in which B.D. Macdonald J. adopted this approach, but purported to exercise a discretion to adjust the date from which interest ran on past wage loss.

(4) Lost income is general damage which nevertheless must be apportioned. Prejudgment interest is payable on the whole of the past component only at a reduced rate.[28]

(5) Lost income must be apportioned. The past component is special damage, and prejudgment interest on it is payable in accordance with sections 1(2) and (3) of the *Court Order Interest Act*. No prejudgment interest is payable on the future component.[29]

(6) Lost income must be apportioned. It is open to the trial court to account for the gradual accumulation of this loss either by treating it as special damage, or as general damage or in any other convenient manner.[30]

Notwithstanding the occasional case in which courts persisted in adopting the "capital asset" view of wage loss and refused to apportion wage loss into past and future components, it seemed reasonably well settled that wage loss came within section 2 of the *Court Order Interest Act* and should be apportioned. Even given that conclusion, however, there remained a good deal of confusion respecting the manner in which court order interest ought to be calculated on the past component of income loss. In *Andrews* v. *Farrell Estates Ltd.*,[31] the Court of Appeal declined to adopt one or another method of characterizing the past loss. Later in this chapter we shall describe the impact of more recent decisions on these issues.

(e) Damages for Wrongful Dismissal

At common law, an employer may terminate a contract of employment for cause. "Cause" may be defined as conduct by an employee in breach of his duties or obligations to his employer. If the employer wishes to terminate the contract without cause, the dismissal is said to be "wrongful" and the employee is entitled to a reasonable period of notice. If the employer declines to give notice, then he must pay damages in lieu. These damages are calculated on the basis of the benefits which would have accrued to the employee during the notional period of notice. They are income-related.

Debate has arisen whether the loss, being a lump sum which ought to have been paid by the employer forthwith upon dismissal, is a capital asset which ought to attract prejudgment interest from the date of termination, or whether it is an award to replace the income which would have been earned during the notice period and which ought to be apportioned into past and future components.

British Columbia courts originally adopted the capital asset view that damages for wrongful dismissal do not represent, in any case, pecuniary loss arising after the date of judgment.[32] This view has now been overtaken by

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[28] *Mandas* v. *Thomschke*, (1983) 44 B.C.L.R. 322 (B.C.S.C.).

[29] *Baart* v. *Kumar*, [1983] 4 W.W.R. 419 (B.C.S.C.). *See also Pavlak* v. *Doucette*, [1985] 2 W.W.R. 588 (B.C.S.C.).

[30] *Andrews* v. *Farrell Estates Ltd.*, [1984] B.C.D. Civ. 3375-01 (B.C.C.A.), leave to appeal refused (1985) A.C.W.S. (2d) 432 (S.C.C.).

[31] *Ibid.*

[32] *Wilks* v. *Moore Dry Kiln Co. of Canada*, (1981) 32 B.C.L.R. 149 (B.C.S.C.). *See also William P. Crooks Construction Ltd.* v. *Cantree Plywood Corp.*, (1985) 31 A.C.W.S. (2d) 382 (B.C.S.C.), *per* Wallace J., *dubitante*. *Laird* v. *Cyprus Anvil Mining Corp.*, (1984) 59 B.C.L.R. 341 (B.C.S.C.); *cf. per contra Gardner* v. *Amerigo Technology Ltd.*, [1985] B.C.D. Civ. 1296-06 (B.C.S.C.), which appears to be *per incuriam*. A similar conclusion was reached in Nova Scotia: *Rogers* v. *Canadian Acceptance Corp.*, (1982) 98 A.P.R. 537, 50 N.S.R. (2d) 537 (N.S.S.C.). One Ontario case adopts the view that such damages must be apportioned: *Blackburn* v. *Coyle Motors Ltd.*, (1983) 44 O.R. (2d) 690 (Ont. H.C.). Later authority adopts the "capital asset" view: *Rushton* v. *Lake Ontario Steel Co.*, (1980) 29 O.R. (2d) 68, 112 D.L.R. (3d) 144, 16 C.P.C. 191 (Ont. H.C.). The issue does not yet apear to be settled in Ontario. In *Blackburn*, the court refused to follow *Rushton*. However, in *Crease* v. *Bd. of Commissioners of Police of the Municipality of Metro Toronto*, (1982) 39 O.R. (2d) 89, 139 D.L.R. (3d) 238 (Ont. H.C.) *aff'd* 143 D.L.R. (3d) 575, 40 O.R. (2d) 640 (Ont. C.A.), *Rushton* was applied. The *Blackburn* case did not refer to *Crease*. The Ontario Court of Appeal in *Change* v. *Simplex Textiles Ltd.*, (1985) 29 A.C.W.S. (2d) 193, approved a trial judgment adopting the "capital asset" approach on the ground that it had a "logical" basis. The judgment, as digested, appears to leave open alternative approaches in other cases.

recent developments. The decision of the British Columbia Court of Appeal in *Suttie* v. *Metro Transit Operating Co.*[33] makes it clear that British Columbia courts, in future wrongful dismissal cases, should treat the damages as lost income on which prejudgment interest is to be calculated as in every other case involving lost income.

(f) Loss of Support: Fatal Accident Cases

Under the *Family Compensation Act*,[34] the spouse and children of a person whose death is caused by the wrongful act of another may bring action against the wrongdoer for lost financial support. This financial support may be readily identified as a form of income loss.

In *Robson* v. *Official Administrator, County of Cariboo*,[35] the Court of Appeal specifically exempted cases decided under the *Family Compensation Act* from its conclusion that damages for lost income ought to be apportioned:[36]

> Nothing I have said with respect to the applicability of s. 2(a) of the Prejudgment Interest Act in this case should be taken as applicable to. . . actions under the Families' Compensation Act. . . .

Whether or not section 2(a) does apply so as to require the apportionment of an award of damages for lost support is a question that, in the cases, became firmly linked to the practice of discounting such awards. In this context the question became one of determining the date to which the discount should be made.

If section 2(a) requires apportionment of loss, then past loss of support and future loss of support would have to be calculated separately. Prejudgment interest would be added to the damages for the past loss. The future loss would be discounted to the date of judgment and attract no interest. Conversely, the present value of the future stream of support may be calculated as at the date of death. This will involve an actuarial assumption that the plaintiff would have notionally invested that lump sum at compound interest throughout the prejudgment period. Prejudgment interest would then have to be awarded on the whole award of damages under this head from the date of death, since, by reason of the delay in payment, the plaintiff has not had the money to invest in order to produce the income contemplated by the actuarial calculations.[37]

The British Columbia cases dealing with the calculation of prejudgment interest on damages in fatal accidents have displayed a rather more sophisticated, albeit imperfect, grasp of the relationship between discounting, the assessment of loss, and the calculation of prejudgment interest than did cases dealing with income lost as a result of personal injury. In the fatal accident cases, the courts recognized that applying actuarial principles might lead to more than one approach to calculating the value of the loss and prejudgment interest on the loss. Since these cases form the background against which the now leading decision in *Baart* v. *Kumar*[38] was decided, it is helpful to canvas them in some detail. In particular, two decisions of the Court of Appeal may be seen as direct precursors to that case.[39]

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[33] *Supra*, n. 9. A similar result was reached by Wallace J. in *Kozak* v. *Schinkel*, [1985] B.C.D. Civ. 3652-04 (B.C.S.C.).

[34] R.S.B.C. 1979, c. 120.

[35] *Supra*, n. 26.

[36] *Ibid.* at 222.

[37] In some cases, courts have gone so far as to award post-judgment interest by way of damages in excess of the legal rate of 5% in order that the damage award conform to actuarial calculations based on a greater rate of return. These orders, known as "Laroque" orders, are discussed in Chapter XII, *post*. The analysis of the impact of discounting presented in this Chapter was also adopted by the Manitoba Court of Appeal in *Rose* v. *Belanger*, [1985] 3 W.W.R. 612, 618 *et seq*.

[38] *Supra*, n. 8.

[39] *Killeen* v. *Kline*, (1982) 33 B.C.L.R. 225, [1982] 3 W.W.R. 289 (B.C.C.A.); *Weiser* v. *Pearson*, [1981] 4 W.W.R. 697, 126 D.L.R. (3d) 237 (B.C.C.A.). *See also Harrison* v. *Rocky Mountain Transport Ltd.*, [1983] B.C.D. Civ. 3359-04 (B.C.S.C.). *Cf. Rose* v. *Belanger*, *supra*, n. 37 at 618-620.

Early decisions of the British Columbia Supreme Court were inconclusive as to which of two competing approaches were to be adopted. Some cases adopt the "capital asset" view that damages for lost support arise at the date of the fatal accident and, hence, are not to be apportioned, and attract interest in full.[40] Other cases adopt the "apportionment" approach under which loss is apportioned pursuant to section 2 of the *Court Order Interest Act*, and interest paid on the past component only.[41]

Inevitably this issue reached the Court of Appeal. The first decision was *Weiser* v. *Pearson*.[42] The trial judge held that the agreed sum of $250,000 allocated in a consent judgment to lost support should be apportioned, and that interest be awarded on the past component only.[43] This approach was unanimously approved by the Court of Appeal, which expressed the view that the result in the *Robson* case[44] should apply equally in fatal accident cases.[45]

Despite the clear and unequivocal decision in *Weiser*, the Court of Appeal in *Killeen* v. *Kline*[46] arrived at a different conclusion. At trial, the present value of the plaintiff's lost support was calculated as of, and discounted to, the date of death.[47] The trial judge then proceeded to apportion the damages, and awarded prejudgment interest on the past component only.[48]

The Court of Appeal held that this approach was erroneous. Earlier authority suggests that the proper course would have been to recalculate the judgment in accordance with actuarial calculations based on apportionment.[49] The Court of Appeal did not do this. Instead, it held that it was open to the trial court judge to adopt either the "capital asset" or the "apportionment" approach, provided he did so consistently:[50]

> In my opinion, the difference between the authorities is more apparent than real. They do not represent conflicting legal principles but rather two different methods of applying the principle of full compensation to a fatal accident case.
>
> If the determination of lost future benefit is made *as of the date of trial* by a discount going back to that date and on the basis of a life expectancy running from the date of trial, and if the loss to date of trial is made the subject of a separate and less unreliable calculation, then the prejudgment interest should be awarded only on the loss to date of trial and should not be awarded on the lost benefit after the date of trial.
>
> If, on the other hand, the determination of lost future benefit is made *as of the date of death* through a discount going back to the date of death for a life expectancy measured from the date of death, then prejudgment interest should be awarded on the full amount of the discounted benefit in order to bring the benefit up to what it would have been at the date of trial.

The judgment concluded:[51]

> In summary, it is my opinion that the better course in a fatal accident case is to award an amount representing pecuniary loss to the date of trial or judgment and a separate amount representing fair and adequate compensation for future pecuniary loss after the date of trial or judgment. . . .

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[40] Cases favouring the "capital asset" view: *Roed* v. *Tahsis Company*, (1977) 4 B.C.L.R. 176 (B.C.S.C.); *Sedam* v. *Whitehead*, [1981] B.C.D. Civ. 2058-01 (B.C.S.C.); *Heldt* v. *Jack Cewe Ltd.*, [1979] B.C.D. Civ. 3383-03 (B.C.S.C.), (*aff'd* [1982] B.C.D. Civ. 3359-01 (B.C.C.A.) on a different point).

[41] Cases favouring the apportionment approach: *Weiser* v. *Pearson*, [1980] 3 W.W.R. 605, 15 C.P.C. 244, 109 D.L.R. (3d) 63 (B.C.S.C.), *aff'd supra*, n. 39; *Bender* v. *Lean*, (1980) 22 B.C.L.R. 273 (B.C.S.C.); *Henry* v. *Butler*, [1980] B.C.D. Civ. 2058-13 (B.C.S.C.); *Malat* v. *Bjornson*, [1981] 2 W.W.R. 59 (B.C.S.C.); *Killeen* v. *Kline*, [1980] B.C.D. Civ. 3380-03 (B.C.S.C.).

[42] *Supra*, n. 39.

[43] *Supra*, n. 41.

[44] *Supra*, n. 26.

[45] *Supra*, n. 39 at 699 (W.W.R.).

[46] *Supra*, n. 39; followed in *Forbes* v. *Hennigar*, (1985) 59 B.C.L.R. 256 (B.C.S.C.).

[47] *Supra*, n. 39.

[48] *Cf. Jeselon* v. *Waters*, [1981] 3 W.W.R. 715 (B.C.S.C.), in which Bouck J. held that it was not open to him to do likewise.

[49] Or to refer the matter back to the trial court for reassessment if no such calculations could be made on the evidence.

[50] *Supra*, n. 39 at 246-247 (B.C.L.R.).

[51] *Ibid.* at 249-250.

> But it is also my opinion that it is not an error in principle to award one single amount that represents pecuniary loss from the date of death to the expiry of the life expectancy as was done in this case. But if that is done then a different theory has been adopted and on that theory prejudgment interest must be awarded on the full amount fom the date of death to the date of judgment. Any minor remaining discrepancy revealed by the application of the actuarial evidence to the particular facts of a case could be adjusted in the settling of the interest rate.

Weiser v. *Pearson* was distinguished on the basis that the mode of calculation adopted in that case was dictated by the manner in which the consent judgment had been formulated.

The "optional" approach approved in *Killeen* v. *Kline* was based on the assumption that applying either the "capital asset" or the "apportionment" approach in a particular case would not lead to any significant difference in the result. An actuary's report which was crucial to the determination that results would not materially differ whichever approach is adopted:[52]

> In a simple case these two approaches will produce the same result. In a more complicated case they will still produce approximately the same result. I will set out the example given by the actuary in his further evidence in this case.

The facts of the example were then set out along with the necessary calculations using both approaches, and the conclusion to be drawn:[53]

> The Second Approach gives exactly the same result as obtained by the First Approach. In other words, the amount of the lump sum determined as of the date of death, plus interest thereon for the term from death to trial, will generate the same value as if the determination is done as at trial.

The calculations (which are set out in detail in Appendix D) adopted a prejudgment interest rate of 7% on the past component of loss. It had also been agreed by counsel that 7% represented the appropriate discount rate.

These particular calculations cannot be disputed and the conclusion that they yield the same result irrespective of which approach is adopted is perfectly justified. Unfortunately, however, to reason from the fact that an identical result was obtained on the particular facts of the example, to a wider conclusion that equivalent results will be obtained in all cases, is not justified.

In the example, identical results were achieved only because of a very peculiar coincidence. The same figure, 7%, was used for both the rate of prejudgment interest and the discount rate. Where the same figure is used for those two variables the two approaches will yield identical results as occurred in the example set out in *Killeen* v. *Kline*. Where different figures are used for the discount rate and the rate of prejudgment interest, the two approaches do not yield the same result. The coincidence of these two rates which occurred in *Killeen* v. *Kline* is unlikely to recur. Since that decision, legislation has fixed the appropriate discount rate at 2.5% and prejudgment interest is commonly awarded at rates in excess of 7%.

Altering these two variables has a significant impact. Contrary to the conclusions in *Killeen* v. *Kline*, the "capital asset" approach leads to significantly larger recovery by the plaintiff than the "apportionment" approach.[54]

In Appendix D to this Report, we have reproduced the results of applying a 2-1/2% discount rate to two cases — the first derived from the facts of *Killeen* v. *Kline*, and the second, a hypothetical case involving a loss of support of $10,000 *per annum* for a period of 25 years, and a trial date five years after the death in issue. It is readily apparent that the two approaches

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[52] *Supra*, n. 39 at 247 (B.C.L.R.)

[53] *Ibid.*

[54] Another, less fundamental, difficulty also appeared in *Killeen* v. *Kline*. In assessing the interest payable on the present value of lost support, discounted to the date of death, the interest payable was compounded. Section 2 of the *Court Order Interest Act* forbids the compounding of prejudgment interest.

yield very different results indeed. On the facts of *Killeen* v. *Kline* itself, if prejudgment interest is calculated at the rate of 10%, the difference ranges between approximately $18,000 and $20,000, depending on the assumption made respecting compounding of prejudgment interest. For the second example the difference is even greater. The similarity of result cannot be cited to justify an "optional" approach to calculating prejudgment interest on lost support.

3. Recent Developments

In British Columbia the tendency was to treat losses in fatal accident cases differently from those arising in personal injury cases. Damages for wrongful dismissal were regarded as yet another separate type of income loss. As a result, no unified rules emerged respecting the calculation of court order interest on lost income. It is not apparent that the courts recognized the functional identity of the various categories of lost income.

An unhappy result of this approach was that personal injury cases seldom discussed the effect of discounting on the calculation of prejudgment interest. Fatal accident cases usually ignored questions concerning the proper characterization of past loss when damage was temporally apportioned. It was always possible, however, that damages in personal injury cases could be subjected to an analysis similar to that employed in *Killeen* v. *Kline*, and it was only a matter of time before that argument was made. A plaintiff has much to gain by insisting that loss be valued as at the date the cause of action arose, with prejudgment interest payable on the entire capital sum.

In *Baart* v. *Kumar*[55] and *Suttie* v. *Metro Transit Operating Co.*[56] the British Columbia Court of Appeal took the opportunity to state that all forms of lost income are to be treated similarly. This marks a substantial step forward. The court also took the opportunity to state that when loss is apportioned, lost income should normally be regarded as special damages. This also resolves a great deal of the confusion which had attended this characterization under the earlier state of the law. It is fair to say that these two decisions leave the law a good deal more certain than it was.

There remains, however, room for dispute as to the final position. On one view, the court endorsed a continuation of the two "options" put forward in *Killeen* v. *Kline*: apportionment or discounting to the date the cause of action arose. Although the decisions seem to point more strongly to temporal apportionment of loss than to the other option, the law still cannot be stated with absolute clarity. In applying the principles enunciated in *Killeen* v. *Kline* to cases of personal injury (as *Baart* v. *Kumar* was) the court continued to operate under the assumption that the two methods of calculating court order interest canvassed in *Killeen* v. *Kline* yielded identical results. Thus, in every case, the plaintiff may, depending on the evidence he adduces, constrain the court to follow one or another of the two options cited.

A second view is that the net result of the two cases is an emphatic endorsement of the apportionment approach. On this view, it is misleading to speak of the alternative approach as an option. Rather, the court's concern is that it should remain available to be applied in those rare circumstances where, on very peculiar facts or in the absence of satisfactory evidence, the apportionment of a pecuniary loss into pre-trial and post-trial components cannot be done, or pre-trial components cannot be allocated to particular

[55] *Supra*, n. 8.
[56] *Supra*, n. 9.

portions of the pre-trial period. Support for this view may be found in the observations of Hutcheon J.A. in *Suttie*:[57]

> The second question is the calculation of interest. By reason of the decision of the Court of Appeal in *Baart* v. *Kumar*. . . lost earnings to the date of trial are to be treated as special damages for the purposes of the *Court Order Interest Act*. There may be cases, as Lambert J.A. noted in his concurring reasons, in which the evidence does not permit the assessment as special damages. One example that occurs to me is the author injured in a motor vehicle accident and the damages for pecuniary loss cannot be allocated to six month periods. Generally, however, such an allocation can be made, and the law in this province is that in such cases the loss should be so allocated.

On the whole, we believe that a close reading of the two cases supports the second view as a statement of the current law in British Columbia.

D. Reform

1. Pecuniary Loss

The apportionment of pecuniary loss into losses occurring before judgment and those occurring after judgment, with only the former attracting prejudgment interest, is the approach which has attracted the widest support. This is the position which now appears to be adopted by the British Columbia courts, after an initial period of difficulty and uncertainty. It is the approach advocated by the Commission in its 1973 Report and which now appears to be embodied in section 2(a) of the *Court Order Interest Act*. It is also the approach which has been most favourably received outside British Columbia. A review of the jurisprudence concerning the temporal apportionment of loss in other commonwealth jurisdictions indicates that a majority of those with prejudgment interest legislation favour apportionment of pecuniary loss for the purpose of calculating interest.[58] The experience elsewhere also confirms that apportioning loss presents no insuperable practical problems.

Nothing in the further research we have undertaken nor in the responses to the Working Paper persuade us that a retreat from the apportionment principle is desirable. We have concluded that all forms of pecuniary loss should be apportioned into past and future components with prejudgment interest awarded only on the component of the award which represents past loss. We do see some virtue in restating this conclusion in legislation. While the present *Court Order Interest Act* does embody this approach, the difficulties encountered by the courts over the years suggests that a direct statement of principle is called for rather than leaving it to be arrived at through inference.

The precise form of legislation implementing the conclusion that pecuniary loss be apportioned in time is a matter which we are content to leave to legislative counsel. It is important, however, that the legislative language clearly put an end to the "capital asset" approach. One solution might be to adopt the language of the *Uniform Judgment Interest Act* which forbids awards of interest "on that part of the judgment that represents pecuniary loss arising after the date of the judgment and that is identified by a finding of the court," in preference to loss "arising after the date of the order" found in section 2(a) of our own Act.

The Commission recommends:

7.(1) The New Act should require that all awards for pecuniary loss be apportioned into past and future components, including:

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[57] *Ibid.* at 153-54.

[58] The temporal apportionment of loss in other jurisdictions was canvassed in the Working Paper at 175-183.

(a) expenses incurred or to be incurred;
(b) damages for wrongful dismissal;
(c) damages for lost support or the value of a dependency in fatal accident cases;
(d) damages for lost income or for lost earning capacity.

(2) Prejudgment interest should be awarded only on the past component of an award. The future component of the award should not attract prejudgment interest.

There are two respects in which the preceding recommendation does not restate what we perceive to be the existing law. First, recommendation 7(1)(a) mandating the apportionment of expenses incurred or to be incurred should have the effect of ensuring that no prejudgment interest is payable in respect of "initial outlays" where an expenditure had not, in fact, been made prior to judgment. Earlier in this chapter we concluded that this was the correct result. This would affect the outcome of cases such as *Louie* v. *Dick*[59] discussed earlier in this chapter.

Second, this recommendation, in its present form, does not preserve the relatively narrow discretion to adopt a non-apportionment approach to deal with exceptional circumstances. This was a matter alluded to by Hutcheon J.A. in *Suttie* v. *Metro Transit Operating Co.*[60]

The question whether new court order interest legislation should embody such a discretion is a matter to which we will return later in this Report.[61] The allocation of special damages to six month periods raises an analogous concern and the discretion issue is best addressed after a consideration of that aspect of the *Court Order Interest Act*.

2. Non-Pecuniary Loss

The *Court Order Interest Act* does not prohibit awarding prejudgment interest on damages for non-pecuniary loss suffered in the post-judgment period. Accordingly, such loss is not apportioned into past and future components for the purpose of calculating prejudgment interest.[62]

Like pecuniary loss, non-pecuniary loss may be suffered both before and after the judgment. The general principle that future loss should not attract prejudgment interest militates in favour of its apportionment.

In the Working Paper we raised the question whether this rule called for reconsideration. In particular, we examined the experience of certain Australian jurisdictions[63] where it is the practice to apportion non-pecuniary loss into past and future elements.[64] The tentative conclusion which we reached in the Working Paper was that non-pecuniary loss should not be apportioned. No one who responded to the Working Paper took issue with that conclusion[65] and it thus retains its force as our final recommendation for a number of reasons.

First, we are concerned that the overall thrust of law reform measures arising out of this Report should be balanced in the sense that neither plaintiffs nor defendants, as identifiable groups, would be preferred over the other. The apportionment of non-pecuniary loss could very seriously distort this balance in the sphere of personal injury litigation.

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[59] *Supra*, n. 16.
[60] *Supra*, n. 9 at 153-54.
[61] *See* Chapter VII.
[62] *Jenner* v. *Koller, supra*, n. 3.
[63] *E.g.*, Victoria. *See*, S.V. 1962, No. 6874, amended 1981, No. 7633.
[64] *See* Working Paper at 188-196.
[65] One correspondent suggested that the court might be given a discretion to withhold interest when the whole of the non-pecuniary loss would be suffered after the trial. Since such cases are likely to be rare, we do not feel that any special provision is called for.

Second, the difficulties which the courts have experienced in arriving at a satisfactory position with respect to the apportionment of pecuniary loss suggests to us that a requirement that they apportion non-pecuniary loss would not be welcome at this time.

Third, in Canada the assessment of non-pecuniary loss has an artificial flavour. The trilogy of decisions of the Supreme Court of Canada have placed a ceiling on these damages which many maintain is artificially low.[66] To apportion such an award is to pile artifice on artifice. To require prejudgment interest to be calculated with reference to the peculiar circumstances of the loss is singularly inappropriate when the principal sum is an arbitrary amount not calculated on a similar basis.

The Commission recommends:

8. The New Act should carry forward the principle that the whole of an award of damages for non-pecuniary loss should attract interest throughout the period preceding judgment.

[66] *See* Law Reform Commission of British Columbia, *Compensation for Non-Pecuniary Loss* (LRC 76, 1984).

CHAPTER VI "SPECIAL DAMAGES"

A. Introduction

The calculation of prejudgment interest on "special damages" was outlined earlier in this Report. Subsections 1(2) and 1(3) require that items of special damage be allocated to specific six-month periods. These provisions recognize that special damages accrue gradually throughout the prejudgment period. Two particular issues require comment. The first is whether this method of accounting for past loss should be confined to "special damages." The second is whether six month periods are appropriate.

B. The Meaning of "Special Damages"

What meaning is to be given to the expression "special damages" as used in section 1(2)? Given the different methods used in the *Court Order Interest Act* to calculate prejudgment interest, the importance of this question is obvious. Interest on "general damages" will run for the whole prejudgment period, while interest on "special damages" will only run from the end of the specified intervals in the prejudgment period. The Act defines neither "special" nor "general" damages.[1]

A leading case on the distinction between general and special damages is *Hope Hardware & Building Supply Ltd.* v. *Fields Stores Ltd.* in which Bouck J. noted:[2]

> From these definitions it is apparent that serious difficulties arise when one tries to determine precisely what is meant by the two concepts of general damages and special damages. Many wise and learned Judges have tried to properly categorize the relationship between these two ideas but their efforts have not yet reached perfection. As McGregor, *supra*, states this is in part due to the different purposes for which the phrases are advanced. . .
>
> Because special and general damages have different meanings for different purposes both in contract and in tort and in relation to liability, proof and pleading, it is difficult to say with precision any particular claim falls within the meaning as set out in the *Prejudgment Interest Act*; particularly since it has another objective.

Bouck J. suggested that the issue should be decided in the light of the policies underlying the *Court Order Interest Act*.[3] Accordingly, unless a head of loss was clearly a matter of special damage, it was to be treated as general damage, and thus earn prejudgment interest from the date the cause of action arose.[4] The policies isolated by Bouck J. in this context were compensating the plaintiff for delay in payment, and preventing the defendant from unnecessarily delaying payment. In assessing those policies, the relevant question was whether the loss was "exceptional in . . . character and . . . not such that the law would infer must necessarily follow from the nature of the act."[5] The simplicity of calculation of damage was also regarded as a relevant, but not conclusive factor.[6]

The authority of the tests suggested by Bouck J. is impaired by the reversal of his decision by the British Columbia Court of Appeal.[7] The characterization of the losses as general damage was overruled in two brief

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[1] The former *Judicature Act* of Ontario, as well as the Ontario *Courts of Justice Act, 1984* also refer to "special damages." No definition is provided in either case.

[2] (1978) 90 D.L.R. (3d) 49, 58, 60, 7 B.C.L.R. 321, 7 C.P.C. 253 (B.C.S.C.).

[3] *Ibid.* at 61.

[4] *Ibid.* at 63.

[5] *Ibid.* at 62.

[6] *Ibid.* at 62.

[7] (1980) 137 D.L.R. 58 (B.C.C.A.).

paragraphs, without discussing the tests. This led Esson J. in *Davies* v. *Safeco Insurance Co. of America* to comment:[8]

> The statute does not define the term "special damages" which can have different meanings in different contexts. The matter was considered by *Hope Hardware & Building Supply Co. Ltd.* v. *Fields Stores Ltd.* (1978), 90 D.L.R. (3d) 49, 7 C.P.C. 253, 7 B.C.L.R. 49 (Bouck J.), reversed on this point on January 25, 1980 (*ante*, p. 58). The decision of the Court of Appeal appears not to have been reported. I think that decision is authority for saying that, if the nature of the damages is payments made by the plaintiff after the cause of action arises, they are special damages within the meaning of the *Court Order Interest Act*.

In *Clowes* v. *Bell*, by way of contrast, the fact that the *quantum* of damages was ascertainable and easily calculated was crucial to its characterization as special damages.[9]

The difficulty of distinguishing between general and special damages has been particularly acute in respect of pre-trial wage loss. Until very recently, British Columbia courts took a unique view of this type of loss. It was characterized as a matter of general, rather than special damage. This yielded the strange result that all pre-trial wage loss attracted interest from the time the cause of action arose rather than the time the loss was suffered. The leading case was *Heltman* v. *Western Canadian Greyhound Lines Ltd.*,[10] a decision of the British Columbia Court of Appeal. The recent decision of that Court in *Baart* v. *Kumar*,[11] however, appears to have overtaken it and strongly suggests that past wage loss is to be treated as "special damages" for the purposes of prejudgment interest. This case was discussed in greater detail in Chapter V of this Report.

Confusion is also apparent in the approach of the British Columbia cases to the cost of clean-up and repair of defective premises. In the *Hope Hardware*[12] case, Bouck J. concluded that repair costs constituted general damage. The decision was overruled by the Court of Appeal which concluded such loss is properly regarded as special damage.

In contrast is the Court of Appeal decision in *C.R.F. Holdings Ltd.* v. *Fundy Chemical International Ltd.*[13] The defendants were liable for a fraudulent misrepresentation which induced the plaintiff to purchase and develop land formerly used as a dumping ground for radioactive slag. It was held at trial that the measure of damages was the cost of removing the slag from the land and repairing affected buildings. Since, by reason of the unavailability of a disposal site, the expenses had not been incurred, Taylor J. held that they constitute future pecuniary loss which did not attract prejudgment interest.[14] It is implicit in this conclusion that had the money been expended, it would have constituted special damage.

The Court of Appeal disagreed.[15] They preferred to characterize the claim as one for a diminution in value of the property. The loss accordingly constituted general damage which attracted prejudgment interest from the date the cause of action arose. This characterization of the loss turned on the measure of damages assessed in cases involving deceit. The court did not

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[8] (1982) 137 D.L.R. (3d) 66 at 68 (B.C.S.C.); *cf. Suttie* v. *Metro Transit Operating Co.*, (1983) 148 D.L.R. (3d) 354 [1983] 5 W.W.R. 279, 45 B.C.L.R. 394 (B.C.S.C.) in which Callaghan J. expressed the view that Bouck J.'s reasoning respecting the characterization of special damages was still good law (at 356). *Suttie* was affirmed by the Court of Appeal, (1986) 2 B.C.L.R. (2d) 145.

[9] (1981) 26 B.C.L.R. 9 (B.C.S.C.).

[10] (1966) 57 W.W.R. (N.S.) 449 (B.C.C.A.).

[11] (1985) 66 B.C.L.R. 1 (B.C.C.A.).

[12] *Supra*, n. 2.

[13] (1981) 21 B.C.L.R. 345, 14 C.C.L.T. 87 (B.C.S.C.); [1982] 2 W.W.R. 385, 33 B.C.L.R. 291, 19 C.C.L.T. 263 (B.C.C.A.); (1982) 39 B.C.L.R. 43, [1982] 5 W.W.R. 688 (B.C.S.C.) (reassessment of damages).

[14] *Ibid.*

[15] *Supra*, n. 13.

purport to lay down any general rule applicable to repair costs. The *C.R.F. Holdings* case does illustrate the somewhat arbitrary results which flow from drawing a distinction between general and special damage, since in reassessing the plaintiff's loss, Taylor J. found that the value of the property fluctuated in the marketplace with reference to the cost of cleaning up the slag and repairing the buildings.

The history of the judicial approach to the characterization of "special" versus "general" damage required by the *Court Order Interest Act* indicates that, at least in British Columbia, the distinction has not been helpful. In view of the uncertainty which surrounds the term "special damages," we think that some other term should be adopted. In England, Lord Denning used the term "special damage" as synonymous with "the *actual pecuniary loss* suffered by a plaintiff, up to the date of trial."[16] In British Columbia, the *Court Order Interest Act* adopted the term "pecuniary loss" in respect of certain future losses, but adopted Lord Denning's characterization of past pecuniary loss as "special damage," and used that term. While *Baart* v. *Kumar*[17] goes some way towards resolving the confusion, the present terminology makes the Act more complex than is necessary (in appearance if not in reality).

In principle, all past pecuniary loss should be subject to accumulation. There is no reason to distinguish any particular form of pecuniary loss. If it arises prior to trial, then subjecting it to accumulation will provide a fair basis for calculating prejudgment interest. Characterizing any particular loss as special or general damage is a difficult task and one which serves no useful purpose. The distinction should be avoided entirely in the drafting of new legislation.

The Commission recommends:

> *9.(1) The New Act should not carry forward the term "special damages" to describe pecuniary loss arising before judgment.*
>
> *(2) The term "past pecuniary loss" should be adopted for this purpose.*

While Recommendation 9 will not eliminate the need for a court to determine when loss arises, it will ensure that the nature of this task is not obscured by confusing and inappropriate terminology.

C. The Six Month Period

The Act requires that special damages be allocated six month accrual periods. The choice of the appropriate period in which past losses should accumulate represents a compromise between accuracy and ease of calculation. The *Uniform Judgment Interest Act* adopts an accrual period of three months. Nothing in the experience with the *Court Order Interest Act* indicates that a reduction in the length of this period to three months would cause any problems. Could the period be reduced further?

This is another area in which the multiplier scheme for calculating judgment interest permits the legislation to give rather more weight to accuracy of calculation than would otherwise be possible. If the present method of calculating prejudgment interest were to be retained, our preference would be to require past pecuniary loss to be allocated to a three month period. In view of the ease with which a table of multipliers may be used to calculate prejudgment interest, a one month allocation period becomes practical and we

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[16] *Jefford* v. *Gee*, [1970] 2 Q.B. 131, [1970] 1 All E.R. 1202, 1208 (C.A.).
[17] *Supra*, n. 11.

recommend that it be adopted. The result would be to compensate more accurately the plaintiff for past pecuniary loss.

The Commission recommends:

10. Prejudgment interest should be payable on past pecuniary loss from the end of the month to which it relates.

CHAPTER VII FURTHER THOUGHTS ON TEMPORAL APPORTIONMENT AND ALLOCATION

A. Introduction

The *Court Order Interest Act* comtemplates that pecuniary loss shall be identified with particular periods of time. This is a two-stage process. The first stage is to divide the loss into that portion which arises before the judgment and that which arises after. This procedure reflects the requirements of section 2(a). This process, for which we have adopted the expression "temporal apportionment" of loss, was discussed at length in Chapter V. The second stage is to take that portion of the pecuniary loss which arises before judgment and divide it further so that particular parts of the loss are identified with particular portions of the prejudgment period. We adopt the term "allocation" to describe this process to distinguish it from the first stage. The *Court Order Interest Act*, as presently framed, requires the allocation of prejudgment loss to six month periods. Our previous recommendation would call for allocation to one month periods.

What, if any, flexibility do the courts have to avoid apportioning or allocating a loss where it seems inappropriate to do so? So far as the former is concerned, the result of the most recent decisions of the British Columbia Court of Appeal seems to be that, while apportionment has been endorsed as the preferred approach, the courts have retained a discretion of sorts to avoid it through adopting the "capital asset" approach to certain types of loss where apportionment cannot or should not take place. The breadth of this discretion is yet to be tested.

So far as allocation is concerned, the six month rule applies only to "special damages." Thus a court could, by characterizing an item of pre-trial pecuniary loss as "general damages," avoid allocation where that was inconvenient or inappropriate.

The recommendations made so far in this Report would appear to close off these avenues. Under recommendation 7 the courts would be obliged to apportion all awards for pecuniary loss and, barring some extraordinary feat of judicial interpretation, that would eliminate the possibility of resort to the "capital asset" approach. Recommendation 9 would eliminate "special damages" as a term of art in this context and substitute for it an expression of greater breadth. This would foreclose the avoidance technique described above and make allocation mandatory.

Our recommendations, in this regard, reflect the proposals which were set out for comment and criticism in the Working Paper which preceded this Report. The Working Paper did not contain proposals aimed at creating or preserving anything akin to the kind of flexibility the courts now appear to enjoy with respect to apportionment and allocation. Nor was the need for such proposals discussed.

B. The Response to the Working Paper

The issue just described formed one focal point of a very cogent submission made to us by a group which considered the Working Paper in detail. Their comments are worth quoting at some length:

> In your Proposal 12, you say that in awarding prejudgment interest, the Court should be obliged to apportion all awards for pecuniary loss into past and future components. You give examples of some cases in which that must be done. It appears clear from your report that apportionment must also, in respect to past

losses, be made on a monthly basis. We agree that if the proposals of the Commission are adopted in their entirety, it will be necessary to make such an apportionment. While this can be done by a judge, can it be conveniently done by a jury? Little or no difficulty may be occasioned with respect to out of pocket expenses. But damages for wrongful dismissal are often assessed on a global basis, as are other damages which are difficult to assess on any other basis. It would be possible in wrongful dismissal cases to have the jury say how many months notice ought to have been given, and what loss the plaintiff suffered in respect to each of these months. In other cases, where the plaintiff had obtained part-time employment, from time to time, the process would be more difficult for the jury. It might be difficult for a jury to identify loss of support or the value of dependency on a month to month basis in fatal accident cases. Again, this is often a matter of global assessment. Although damages for lost income in the past, and for lost earning capacity in the future can be separated into past and future components, the jury would have to break down the past loss of income into monthly components. . . .

In some cases, all that may be possible is to fix an amount which represents loss from the date the cause of action arose until the date of trial. . . [or] to fix an amount over a shorter period. It does not enhance the certainty or fairness of the calculation of court order interest to apply guesswork upon guesswork to reach a monthly figure, when the only purpose for doing so is to activate the multiplier scheme. Even the perfect machine will not produce an acceptable result if fed inaccurate data. . . .

Some examples of cases where the monthly multiplier system would be inappropriate, and judicial discretion is required, are suggested. . . .

A young person is injured before entering the work force. He seeks damages for income lost to the date of the trial. He has not been able to work at all because of his injuries. Would he have obtained employment at all? At what job? How much of the time would he have worked had he obtained a job? In what months would he have been employed and how often would he have been employed in any particular month?

Similar questions might arise if a person had been injured just as an economic depression began, and when the prospects of employment over the whole period were uncertain. Would he have worked for the whole period, or only part of it? If he worked part-time, in what particular month or months, and at what particular job. . . ?

In some cases, an assessment of past loss of wages has to be arbitrary. Judges have learned to select a figure, even though there is no absolutely clear basis in the evidence for doing so. . . .

In such cases, a judge can fix an amount representing the loss of income to the date of trial, but it is an arbitrary and inaccurate process. To break down the loss into monthly components is sheer guesswork. The awarding of court order interest on the basis of monthly components in such cases does not advance the objective of achieving a better and more fair result than under the present system. . . .

[T]he fixing of monthly components and the use of the multiplier system will be appropriate in many cases. But there will be other cases where the fixing of monthly components would be completely artificial. If respect for the Courts is to be preserved, judges ought not to be involved in transparent guesswork. It is difficult enough to fix a global figure on the basis of scant evidence, but to subdivide that figure into monthly components when there is no rational basis for assigning a particular loss to a particular month is to invite and deserve criticism. The introduction of an obviously excessive amount of guesswork into the process will only make the law and the judges look absurd. . . .

This observation concludes that the task of the courts is to do their best to do justice on such evidence as they have before them; the courts should not be made to look foolish.

C. Our Comments and Conclusions

It is clear on a close reading of this submission that our correspondents are not opposed to the principles of apportionment and allocation *per se*. Rather, their concern is that to require apportionment and allocation in each and every case may lead to inappropriate results where the circumstances of

the case or the evidence led either resist, or are not helpful in, this exercise. Our correspondents, essentially, advocate a technique which would allow the courts to avoid undesirable results.

The undesirable results identified fall into two groups. Both stem from the premise that situations arise in which the assessment of damages is, in essence, an exercise in educated guesswork. The results can be very rough and ready. To take these results and subject them to a highly refined process of apportionment and allocation will not achieve any greater measure of precision or justice than an alternative procedure which might give more explicit recognition to the true character of the assessment process. Second, and more serious, is the concern that to compel a judge to pile "guesswork upon guesswork" and engage in a wholly artificial exercise of apportionment and allocation is so absurd as to bring the administration of justice into disrepute.

A further difficulty identified is the complexities of dealing with apportionment and allocation in a trial with a civil jury.

We have given this submission and these concerns a good deal of consideration and have concluded that our final recommendations should respond to them. We believe that, in fact, the number of situations in which a retreat from mandatory apportionment and allocation is called for will be comparatively rare. Moreover, it must be remembered that only since *Baart* v. *Kumar*[1] and *Suttie* v. *Metro Transit Operating Co.*[2] has it been made clear that the Act normally requires apportionment and that income-like losses are to be treated as special damages and allocated to specific pre-trial periods. These cases, and any legislation which might restate their effect, are bound to influence the conduct of litigation in which apportionment and allocation will be an issue. One might expect that increasingly sophisticated evidence will be led to assist the court in its approach to these twin tasks, where that has not been the case to date.

The concern respecting the complexity of apportionment and allocation in a trial with a jury does not really go to the question of avoiding apportionment or allocation. It is really a question of the respective roles of judge and jury in such proceedings. This, in fact, was recognized by our correspondents:

> We think that such matters may be too complicated for juries, or may unduly complicate the conduct of jury trials. We think that the function of calculating prejudgment interest ought to be left to the judge who conducts the trial. He ought to have a discretion to decide to ask the jury any questions, the answers to which might assist in making an appropriate calculation of interest. He would not be bound to ask such questions, but if they were asked then he would be bound by any finding of fact which the jury made. In the end, however, a judge ought to be empowered to identify the components which are necessary as a basis for the calculation of prejudgment interest, having regard to the evidence given at the trial, and any findings of fact made by the jury.

We agree with the general thrust of this suggestion and believe that the respective roles of judge and jury with respect to prejudgment interest should be clearly set out.

The Commission recommends:

11. The New Act should provide that in a trial by judge sitting with a jury the calculation of prejudgment interest be governed by the following rules:

(a) the calculation of prejudgment interest is a matter for the trial judge;

[1] (1985) 66 B.C.L.R. 1 (B.C.C.A.).
[2] (1986) 2 B.C.L.R. (2d) 145 (B.C.C.A.).

(b) the judge may make all findings of fact necessary to the calculation of interest;

(c) the judge has a discretion to ask the jury to make findings of fact which might assist in the calculation of prejudgment interest.

How should the more general concerns raised by our correspondents be met? It was their suggestion that the courts be given a discretion to depart from apportionment and allocation. Our own predisposition is to avoid giving the courts a discretion with respect to interest unless the concerns at which it is aimed cannot be resolved in any other fashion. We believe that the concerns can, at least in the first instance, be met in another way.

The concern which was put most strongly to us was that mandatory apportionment and allocation would bring the administration of justice into disrepute. It was feared that the sight of a judge, on the basis of little or no evidence, appearing to make precise findings of fact about when particular losses occur would make the courts look foolish. We believe this concern would be overcome if the Act provided certain presumptions as to apportionment and allocation which the court could apply if the evidence or the circumstances of the case did not permit findings of fact to support these processes. The application of statutory presumptions in appropriate cases should embarrass neither the courts nor the justice system.

An example of the kind of presumption we have in mind is to be found in section 1 of the *Negligence Act*.[3] That Act deals with the situation where loss or damage is caused by two or more persons and it requires that the liability to make good the loss or damage be apportioned among those responsible in the degree to which each was at fault. This is an exercise no less metaphysical than apportioning and allocating loss in time. The Act recognizes that appropriate findings of fact may not always be possible so it provides the following presumption:[4]

> If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

So far as we are aware the application of this presumption, when necessary, has not been the source of any embarrassment. We believe that analogous presumptions should be available to assist the judge under a new *Court Order Interest Act*.

The Commission recommends:

12.(1) The New Act should provide that where, having regard to all the circumstances of the case, it is not possible

(a) to apportion a person's pecuniary loss between that arising before judgment and that arising after judgment; or

(b) to allocate the portion of a person's pecuniary loss arising before judgment to specific one month periods;

then the court may apply either or both of the following presumptions:

(c) the person's pecuniary loss is equally divided between that arising before judgment and that arising after judgment; and

(d) the person's pecuniary loss arising before judgment is allocated equally among all the months of the period between the time the cause of action arose and the judgment.

(2) The presumptions in paragraph (1) may be applied to any part of a person's pecuniary loss.

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[3] R.S.B.C. 1979, c. 298.

[4] *Ibid.*, s. 1(a).

We believe that the application of these presumptions will give the courts flexibility to deal with most of the difficult cases which may arise, without abandoning the basic principles of apportionment and allocation. The question then arises whether a residual discretion might still be desirable to deal with any remaining cases where the application of the presumption may be inappropriate. On the whole, we believe that Act could safely include such a discretion.

The Commission recommends:

13. The New Act should provide that where, having regard to all the circumstances of the case,

(a) the apportionment of pecuniary loss into prejudgment and post-judgment components under recommendation 7, or

(b) the allocation of prejudgment loss to particular one month periods under recommendation 10,

and reliance on the presumptions set out in recommendation 12 would result in an injustice or an absurdity, then the court may assess the loss as a global amount with prejudgment interest running from a date to be selected in the discretion of the court.

CHAPTER VIII INFLATION AND COURT ORDER INTEREST

A. Introduction

In many cases, a court must consider a change in the value of a particular asset. For example, the price of a share in a limited company may rise even though the number of shares issued does not change. The purchasing power of the dollar in relation to those shares has declined. This situation must be distinguished from a general decline in the purchasing power of money — inflation. It is frequently noted that one component of market interest rates, and hence of prejudgment interest, is the predicted incidence of future inflation. An award of interest at market rates normally compensates a plaintiff for any loss of value of the money due to inflation.[1]

As F.A. Mann notes in his book, *The Legal Aspect of Money*,[2] at common law courts have accepted and applied the theory of nominalism when dealing with claims for liquidated sums. Under this theory, once the amount of loss has been fixed, no notice is taken of any change in the purchasing power of the currency of account. If a dollar is spent, then the resulting judgment will be for a dollar. Money is treated as having a constant value.

This approach raises questions when damages for non-pecuniary loss are in issue. It is well established that such losses must be valued as at the date of trial. Since the decision of the Supreme Court of Canada in *Lindal* v. *Lindal*,[3] it has been the rule that the $100,000 limit for non-pecuniary loss must be adjusted for inflation from the date of the Supreme Court of Canada judgments in the trilogy.[4] Damages under this head of loss, are calculated on a once-and-for-all basis at the date of trial to compensate for all past and future loss. What, if any, interest should be added to an award of damages for non-pecuniary loss?

The rule that damages for non-pecuniary loss must be assessed in trial date dollars is intended to ensure that the plaintiff is reasonably compensated. It is impractical to attempt to make an intelligent assessment of the value of the dollar, in relation to the injury, at any other time. The result would be speculative and unreliable. Although in general, common law courts have accepted the nominalist theory, they have stopped short of attempting to apply it to damages for non-pecuniary loss.

Since damages for non-pecuniary loss are assessed in trial date dollars, no question arises respecting any loss of value of the judgment during the pre-trial period. The court treats the injury as if it had been suffered on the date judgment is given. To the extent that prejudgment interest attempts to compensate the plaintiff for loss of value of money, an award of prejudgment interest at market rates will compensate the plaintiff twice over for the loss of value of money — once when the principal value of the judgment is calculated, and again when interest is added to it.

B. The British Columbia Law

Until very recently, the British Columbia decisions on this issue were unsatisfactory and, arguably, unsettled. One stream of cases exemplified by

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[1] In *Miller* v. *Riches*, (1984) 5 D.L.R. (4th) 1, [1984] 2 W.W.R. 726, the Alberta Court of Appeal, at 5-6, (D.L.R.) recognized that compensating for the effect of inflation was the proper role of prejudgment interest, and since in Alberta, only a limited discretion to award prejudgment interest existed, courts could not apply inflation factors to all heads of damage. That was effectively an award of interest. *See* to the same effect, R. Bowles, "Interest on Damages for Non-Economic Loss," (1984) 100 L. Q. Rev. 192, 196-197.

[2] 4th edition (1982), Chapters IV and V.

[3] *Lindal* v. *Lindal*, (1981) 129 D.L.R. (3d) 263, [1982] 1 W.W.R. 433, 34 B.C.L.R. 273 (S.C.C.).

[4] *See* Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss*, (LRC 77, 1984).

Fitzpatrick v. *Mann*[5] took the view that the trial judge, in exercising his discretion to set a rate of prejudgment interest under the *Court Order Interest Act*, should set a lower rate with respect to interest on non-pecuniary loss to avoid duplication for inflation. The minimum rate of 5% was held to be a rate "the court considers appropriate in the circumstances. . . ."

The reasoning in this stream of cases did not fare well in the Court of Appeal. In three different cases it was held that such duplication was "incidental" rather than "fundamental" and that no departure from interest at market rates was justified.[6] In reaching this conclusion the Court of Appeal purported to rely on English authority but, unhappily, not all of the relevant cases had been drawn to its attention.[7] At the time the Working Paper was issued we summarized the position as follows:[8]

> The position in England, New South Wales and Nova Scotia corresponds with that advocated by Meredith J. in *Fitzpatrick*. In view of the limited scope of the *Pickett* case relied upon in *McArthur*, and developments elsewhere not cited in *McArthur* or *Andrews*, it may be that the British Columbia Court of Appeal might reconsider its decision in *McArthur*. As the law presently stands, in purporting to apply English authority the British Columbia Court of Appeal has succeeded only in adopting a rule advocated by neither the English Court of Appeal or the House of Lords. However, pending that event, or a further appeal to the Supreme Court of Canada, the law in British Columbia seems firmly fixed. Interest must be awarded on the entire award for non-pecuniary loss from the date the cause of action arose to judgment at the rate fixed for the entire award.

The British Columbia Court of Appeal did, in fact, reconsider its decision on this issue. In *Leischner* v. *West Kootenay Power and Light Co.* the court, sitting with a panel of five justices, in essence overruled the previous decisions. It stated:[9]

> . . . [T]he fact that inflation may already have been taken into account in the award may be a relevant factor in determining the appropriate rate of interest in tort actions where, unlike actions in contract, damages are calculated as of the date of trial. The purpose of prejudgment interest is to place the plaintiff in the position he would have been in had the award been paid on the day his cause of action arose. If the award is updated for inflation occurring between then and the trial date, he is placed substantially in that position, except for what money would have earned in that period over and above inflation. To put it another way, a large component of commercial interest rates is inflation — investors demand a return which will keep up with inflation and yields something in addition. To award the plaintiff damages reflecting inflation to the date of trial, as well as interest at commercial rates from the date the cause of action arose, may result in duplication and over compensation.
>
> We therefore conclude that it is open to a trial judge fixing the rate of prejudgment interest on damages in a tort action to take into account the fact that inflation to the trial date is reflected in the award.

This decision does not *require* that a lower rate of prejudgment interest be fixed in these cases. It remains a matter of discretion.

This discretion means that uneven results will almost inevitably arise. In a more recent case, after referring to *Leischner*, the trial judge observed:[10]

> In the case at bar, the jury assessed the plaintiff's non-pecuniary loss at $100,000. . . . There is nothing to show how the jury arrived at the amount of

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[5] [1982] B.C.D. Civ. 3389-02 (B.C.S.C.).

[6] *Hatton* v. *Henderson*, (1981) 29 B.C.L.R. 317 (B.C.C.A.); *Andrews* v. *Farrell Estates Ltd.*, [1984] B.C.D. Civ. 3375-01 (B.C.C.A.); leave to appeal refused, (1985) 29 A.C.W.S. (2d) 432, para. 29:0906; *McArthur* v. *Barton*, (1982) 37 B.C.L.R. 10 (B.C.C.A.).

[7] *Pickett* v. *British Rail Engineering Ltd.*, [1980] A.C. 136, [1979] 1 All E.R. 774 (H.L.). *Compare Birkett* v. *Hayes*, [1982] 1 W.L.R. 816, [1982] 2 All E.R. 710 (C.A.); *Wright* v. *British Railway Board*, [1983] 2 A.C. 773, [1983] 2 All E.R. 698 (H.L.).

[8] Working Paper at 207.

[9] (1986) 70 B.C.L.R. 145, 181-82.

[10] *Falck* v. *Vancoughnett*, [1986] B.C.D. Civ. 2058-13 (B.C.S.C.). *See also, Biron* v. *Carson*, [1987] B.C.D. Civ. 2058-01 (B.C.S.C.). *Compare, Cotter* v. *Lopes*, (1986) 39 A.C.W.S. (2d) 283 (B.C.S.C.); *Simkus* v. *Nicol*, (1986) 39 A.C.W.S. (2d) 283 (B.C.S.C.); *Herrett* v. *Moore*, B.C.C.A., Sept. 8, 1986, CA V000009 (Victoria Registry).

> damages for non-pecuniary loss. There was obviously nothing in the evidence or my charge to indicate what amounts had been awarded by judges of this Court in earlier decisions. Obviously the jury made its award in terms of today's dollars, and although the purchasing power of the dollar has no doubt decreased since the accident due to inflation, there is nothing to show that the jury took inflation since the accident to the date of trial into account in assesing the non-pecuniary damages. In the absence of any indication that the jury updated their award for inflation since the accident, I cannot assume that they did. I therefore fix the rate of interest on the award for non-pecuniary loss at the rates applicable from time to time to monies in Court [a market rate].

This decision would appear to be inconsistent with the *Leischner* decision. It is important that these principles be settled.

C. Is Reform Required?

In terms of the existing structure of the *Court Order Interest Act*, the position achieved by the Court of Appeal following the *Leischner* case, if consistently applied, would be relatively satisfactory. It cannot, however, stand with the recommendations we have made in this Report. We have recommended that the judges should no longer have a discretion with respect to the fixing of prejudgment rates. Rather, these rates should be fixed with reference to a particular rate.

Given these recommendations, and no more, the over-compensation through duplication of inflation would continue and the trial judge would have no means to avoid that occurrence as was done in *Leischner*. If duplication for inflation is to be avoided it is an issue which must be addressed directly in a revised *Court Order Interest Act*. Two different approaches have been seriously debated in the commonwealth courts.

D. Options for Reform

1. Award No Prejudgment Interest on Non-Pecuniary Loss

In *Cookson* v. *Knowles*,[11] the English Court of Appeal expressed the opinion that no interest should be awarded on non-pecuniary loss. In *Birkett* v. *Hayes*,[12] Lord Denning pointed out that this position had attracted considerable support in England. The Law Commission in its *Report on Personal Injury Litigation*[13] took the same point as Lord Denning M.R. in *Cookson* — the plaintiff had "gained" by the increase in the size of the award due to inflation and ought not to have interest as well.[14]

Although the Pearson Commission[15] disagreed with the view that assessing loss in trial date dollars represented a gain to the plaintiff, they did accept that no interest should be recovered on damages for non-pecuniary loss.[16]

> . . . [W]e agree. . . that no interest should be awarded on non-pecuniary damages. As we have pointed out elsewhere, in present economic conditions an investor may well be unable to do more than maintain the real value of his investment, once tax and inflation are taken into account, if indeed he can manage to do this. To award no interest on non-pecuniary damages may therefore be at least as favourable as the award of interest at a market rate on damages for past pecuniary loss. A more important justification, however, lies in the conventional nature of non-pecuniary damages. We do not think that it would be appropriate to subject essentially arbitrary figures to detailed financial calculations.

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[11] [1977] 3 W.L.R. 279, [1977] 2 All E.R. 820 (C.A.).
[12] *Supra*, n. 7 at 712-13 (All E.R.).
[13] Law Com. No. 56 (1973).
[14] *Ibid.* at 75.
[15] Royal Commission on Civil Liability and Compensation for Personal Injury, *Report*, (1978) Cmnd. 7054.
[16] *Ibid.* at 162.

The reasoning of the Pearson Commission is not too helpful. The first point turns on economic conditions in England which are not duplicated in Canada, where investors appear to obtain at least a small real rate of return on investment. Nor should the conventional nature of the award militate against prejudgment interest. The plaintiff has, in fact, been kept out of the conventional sum and the defendant has had the use of the money. The reasoning of the Pearson Committee appears to confuse the process of calculating the *quantum* of the award with calculating compensation for delay in its payment.

2. Award the Real Rate of Interest

A more attractive approach would be to award some "nominal" rate of interest on the past component of non-pecuniary loss to reflect the fact that the plaintiff has been deprived of its use. How should a nominal rate be determined? One approach is to lead evidence which will enable the courts to establish guidelines based on the actual recovery of interest in times of stable currency — the so-called "real rate" of return.

In British Columbia, no such inquiry is necessary. The discount rate established by the Chief Justice of the Supreme Court under the *Law and Equity Act*,[17] is a measure of the real rate of return in British Columbia. Using that figure would be a convenient way to measure compensation for loss of use.

Section 51 of the *Law and Equity Act* provides for two rates:

> (2) The Chief Justice of the Supreme Court may make regulations prescribing
>
> (a) a discount rate which shall be deemed to be the future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity, and
>
> (b) a discount rate which shall be deemed to be the future difference between the investment rate of interest and the rate of general price inflation.

The rate set under paragraph (a) is used in calculating the present value of lost earnings and lost support, while the discount rate under paragraph (b) is used in all other proceedings to calculate the present value of future damages. At present, the rate set under (a) is 2½%, while under (b), the rate is 3½%. The latter rate most closely parallels the real rate of return.[18]

The Commission recommends:

14. Prejudgment interest payable on damages for non-pecuniary loss should be at the rate set by the Chief Justice under section 51(2)(b) of the Law and Equity Act.

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[17] R.S.B.C. 1979, c. 224.

[18] In England and New South Wales, the sum of 4%, was identified as the real rate of return. This rate was halved to reflect the accumulation of non-pecuniary loss over the pre-trial period, yielding a nominal rate of 2%. We do not think it necessary to adopt such a refinement. There is little to be gained in terms of fairness by reducing prejudgment interest further and there is no basis for any assumption that non-pecuniary loss is suffered at an even pace throughout the pre-trial period.

CHAPTER IX THE SCOPE OF THE ACT

A. The Concept of a Pecuniary Judgment

The *Court Order Interest Act* applies only to "pecuniary judgments." The meaning attached to that expression is crucial in determining what types of awards do or do not attract interest.

The words "pecuniary judgment" were not used in the 1973 *Report on Pre-Judgment Interest*. Instead, it was recommended that interest be awarded on any judgment "sounding in money." This phrase was chosen to distinguish orders which do not require the payment of money, such as a decree of divorce or an injunction, from those which are simple commands to pay money. Interest can only be calculated on a sum of money, and if no sum is referred to in the court order, then the judgment does not "sound in money." The legislature, in implementing the 1973 recommendations, adopted the phrase "pecuniary judgment" to capture this concept.

B. Declaratory Orders

Many disputes are resolved by a court declaration as to what the rights of the parties are. For example, a court may declare that a taxpayer is entitled to a refund. In British Columbia, it is well established that such a declaration is not a pecuniary judgment, and the court has no power to declare that prejudgment interest is payable on the amount in issue. The leading case is the decision of the Court of Appeal in *Crown Zellerbach Canada Ltd.* v. *The Queen*.[1] The plaintiff sought a declaration that it was entitled to interest on an overpayment of taxes. Section 104 of the *Taxation Act* then in force[2] obliged the Minister to refund any overpayment when an assessment was proved erroneous. The refund was duly made, and an action ensued when interest was refused on the refund. A chambers judge, noting that the action was not a direct action for judgment (which could not have succeeded, the money having been paid) dismissed a summary judgment application by the plaintiff. The argument was that there was no independent obligation to pay interest on which the claim could be based.[3] The pleadings were then amended to ask for a declaration that the refund was due with interest. Successful at trial,[4] the plaintiffs lost on appeal.

Two grounds were put forward in rejecting the claim for interest. The first was that a distinction was to be drawn between an order for the payment of money and a declaration that money was payable. Only the former constituted a "pecuniary judgment."[5] Second, at the time the writ issued, no "cause of action" existed because the money had been paid.[6] This decision was affirmed by the Court of Appeal in *Lynden Transport Inc.* v. *Min. of Finance*,[7] and has been consistently applied in British Columbia courts.[8]

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[1] (1979) 101 D.L.R. (3d) 240, 13 B.C.L.R. 276 (B.C.C.A.).

[2] R.S.B.C. 1960, c. 376.

[3] *Supra*, n. 1 at 242-43 (D.L.R.). *Cf. Cottrell Transport Inc.* v. *Director of Employment Standards*, (1984) 58 B.C.L.R. 299 (B.C. Co. Ct.) in which it was held that an order upholding the director's determination of wages due and owing was not by nature a declaratory judgment, since the appeal resulted in an order for payment.

[4] (1978) 92 D.L.R. (3d) 459, 94 D.L.R. (3d) 479, 8 B.C.L.R. 187 (B.C.S.C.).

[5] *Supra*, n. 1 at 244 (D.L.R.).

[6] *Ibid.* To the same effect, *see Bernardo* v. *I.C.B.C.*, 41 B.C.L.R. 399 (B.C.S.C.), appeal dismissed (1984) 55 B.C.L.R. 279(B.C.C.A.).

[7] (1981) 128 D.L.R. (3d) 30, 31 B.C.L.R. 70 (B.C.C.A.)

[8] *Ocean Construction Supplies Ltd.* v. *Min. of Finance*, [1980] 6 W.W.R. 497 (B.C.S.C.); *Erco Industries Ltd.* v. *Min. of Finance*, [1981] B.C.D. Civ. 4013-03 (B.C.S.C.); *Royal Bank* v. *Gustin*, (1982) 41 B.C.L.R. 150 (B.C.S.C.); *Langford* v. *Sengara Enterprises*, (1978) 6 B.C.L.R. 372, 5 R.P.R. 100 (B.C. Ct. Co.); *Westburne Industrial Enterprises* v. *Loughheed Towers Ltd.*, [1985] B.C.D. Civ. 2588-01 (B.C.C.A.).

A number of cases[9] have, however, distinguished the *Crown Zellerbach* case on the basis that it did not apply where the Crown was ordered to refund a specified sum.[10]

Whether the court should be empowered to declare that, in addition to being owed money, the plaintiff is entitled to prejudgment interest, is strictly a question of policy. No practical difficulty is involved. In *Bloch* v. *Bloch*,[11] the High Court of Australia affirmed that an action for a declaration of entitlement to the proceeds of sale of realty was an action for the "recovery of money," and attracted an award of interest under the Queensland *Common Law Procedure Act*.[12] Similarly, the *Uniform Judgment Interest Act*, in a formulation adopted in both Alberta and Manitoba,[13] applies "where a person obtains a judgment for the payment of money or a judgment that money is owing. . . " This language plainly recognizes the possibility of a declaratory judgment attracting prejudgment interest.

The main argument in favour of expanding the concept of the "pecuniary judgment" so as to include declarations, and thus bring them within the prejudgment interest scheme, is one of essential fairness between litigants. This is the same policy that underlies prejudgment interest generally.[14]

The only concern in this regard turns on the nature of a declaratory order. The order merely declares what the plaintiff's and defendant's rights are. It does not create any new right. Accordingly, if interest is awarded on a declaration, in the act of declaring the respective rights of the parties, the court would by its declaration alter them, creating a right to interest where none previously existed.

The response to this argument is simply that in seeking a declaration, the plaintiff is compelled to resort to the judicial process to assist in the collection of money. The form of the eventual order should be irrelevant. Once its process is invoked, the court should be able to make whatever disposition respecting prejudgment interest may be required in the circumstances of the case.

We have concluded that a declaration that money is owing should attract prejudgment interest.

C. Costs

1. Taxation under the *Legal Profession Act*

In *Re Swinton and Co. and Richez*[15] it was held that the amount found due on the taxation of a bill between a solicitor and his own client, was not a judgment which could attract prejudgment interest. The Registrar had no power in any event to award interest, not being a "court" under the *Court Order Interest Act*. It is also open to a solicitor to sue on the account. If that course is taken, the result will undoubtedly be a pecuniary judgment on which prejudgment interest will be awarded.[16] The court would have no discretion to refuse to add prejudgment interest to the judgment.

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[9] *Pioneer Envelopes Ltd.* v. *Min. of Finance of B.C.*, (1980) 24 B.C.L.R. 175 (B.C.S.C.), appeal dismissed on other grounds, 30 B.C.L.R. 176 (B.C.C.A.); *Nissan Automobile Co. Can. Ltd.* v. *Min. of Finance for B.C.*, [1980] B.C.D. Civ. 3991-01 (B.C.S.C.); *Air Canada et al.* v. *R. in Right of British Columbia*, [1984] 5 W.W.R. 462, 55 B.C.L.R. 378 (B.C.S.C.). In *Ocean Construction, supra*, n. 8 at 498-99 (W.W.R.) McKay J. refused to follow the *Pioneer Envelope* case, since the case at bar involved a mere declaration.

[10] The validity of this distinction may be doubted since in *Lynden, supra*, n. 7 at 32 (D.L.R.), the Court of Appeal held that in tax cases, the proper form of judgment was declaratory in nature. This appears to have been lost sight of in the later case of *Lynden Transport Ltd.* v. *R. in Right of B.C.*, (1985) 62 B.C.L.R. 314 (B.C.S.C.).

[11] (1981) 55 A.L.J.R. 701 (Aust. H.C.)

[12] 1867-1972, s. 72.

[13] *Judgment Interest Act*, R.S.A. 1980, c. J-0.5 (1984); *Judgment Interest and Discount Act*, S.M. 1986, c. 39.

[14] *See, Pioneer Envelopes, supra*, n. 9 at 187-188.

[15] (1981) 33 B.C.L.R. 36 (B.C.S.C.).

[16] As in *Re Caplan*, (1979) 13 B.C.L.R. 286 (B.C.S.C.). *See also Mortimer* v. *Vedovato*, (1985) 7 C.P.C. (2d) 227 (B.C. Co. Ct.).

There is no justification for any difference in result. It should make no difference if the solicitor seeks to tax the account before the Registrar rather than suing upon it. Equally, if the client has paid any portion of the account, and on taxation a refund is required, (for example, if interim payments exceed the final amount taxed) then the client should be awarded a further reduction on account of prejudgment interest, whether or not the overpayment is promptly refunded.[17]

Why should the registrar or court deprive a solicitor or client of prejudgment interest on an account which is taxed? The supervisory jurisdiction of the court, the Law Society and the registrar's power to reduce an unreasonable account, are adequate protection for clients. There is no reason to go further and treat a solicitor who taxes his costs (or his client if an amount is taxed off the final account) differently from any other party to a commercial transaction.

The *Legal Profession Act*[18] should be amended to clarify that a registrar's certificate[19] given on such a taxation is a pecuniary judgment for the purposes of prejudgment interest legislation.

2. Litigation Costs

Section 2(c) of the *Court Order Interest Act* prohibits any award of prejudgment interest on costs. Absent this provision, an order by a court for the payment of costs arising out of litigation, either on a solicitor and client basis, or, more commonly, on a party and party basis, would likely be characterized as a pecuniary judgment and attract prejudgment interest.

The arguments for this prohibition seem to be twofold. First, in this province, costs are a matter wholly within the discretion of the trial judge. The litigant to whom they are awarded cannot point to a pre-existing entitlement. What has he "been kept out of" and for how long?

Second, party and party costs in no way attempt to fully compensate a litigant so far as costs are concerned. At best they are a partial indemnity for money spent to vindicate legal rights. Prejudgment interest is aimed at making a litigant whole, but that is not the aim of the existing costs system. Thus, it is argued, the two are incompatible.

We believe that these arguments are persuasive so far as the costs relate to "legal services" but that they lose much of their force with respect to disbursements. Here, the policy is to make the litigant whole and the amount and the time of "loss" is readily ascertainable. We see no reason why disbursements, when they form part of an award of costs by the court, and when they have been certified by a taxing officer as properly made, should not attract prejudgment interest as if they were any other kind of prejudgment pecuniary loss.

D. Statutory Exclusions

1. Introduction

Section 2 of the present *Court Order Interest Act* stipulates several situations in which no prejudgment interest shall be payable. The case of

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[17] In *Re Feller & Co.*, (1984) 59 B.C.L.R. 24 (B.C.S.C.), Legg J. held that a client was not entitled to prejudgment interest on a sum refunded after taxation of an account. *Cf. Small v. Northern Horizon Resource Corp.*, (1984) 53 B.C.L.R. 137 (B.C.S.C.), in which a client who obtained a judgment for return of an overpayment was held entitled to prejudgment interest.

[18] 1986 B.C. Bill No. 21. This Bill, which was introduced and received first reading on April 15, 1986, was allowed to lapse. It is expected to be reintroduced in 1987 and will replace the current *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26.

[19] *See ibid.* s. 73.

future pecuniary loss (section 2(a)) was discussed in Chapter V, that of interest on interest in Chapter III and that of interest on costs, above. Section 2 also deals with agreements respecting interest and waiver. Other exclusions are possible.[20]

2. EXCLUSIONS

(a) Agreements Respecting Interest

Section 2(b) excludes the operation of the *Court Order Interest Act* where there is an agreement respecting interest. It has been held that a provision in an agreement for sale of land that "no interest is applicable" is an agreement about interest, which has the effect of excluding the *Court Order Interest Act*.[21] Similarly, if the agreement specifies an unenforceable rate of interest, the *Court Order Interest Act* will not apply.[22]

We see no reason to alter this exclusion.

(b) Waiver in Writing

Although this exclusion did not form part of the Commission's 1973 recommendations, there is no reason to prohibit a person from waiving his right to prejudgment interest. Moreover, the requirement of writing will, in the majority of cases, discourage litigation over the fact of waiver.[23]

(c) Statutory Interest

The *Court Order Interest Act* is silent on the question of interest payable by reason of another enactment.[24] In such a case, as with agreements, the *Court Order Interest Act* should not apply.

E. Recommendations

Our conclusions on the application of the *Court Order Interest Act* to various kinds of claims have been framed in relatively general terms. Our specific recommendations are below.

The Commission recommends:

15. *(1) The New Act should continue to apply to "pecuniary judgments."*
    (2) "Pecuniary judgment" should be defined as including an order for the payment of money or that money is owing.
    (3) No prejudgment interest should be payable:
        (a) if there is an agreement about interest between the parties;
        (b) if a creditor has waived in writing his right to interest;
        (c) if an enactment otherwise provides for the payment of interest;

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[20] In the Working Paper proposals were made for a statutory prohibition on prejudgment interest with respect to a variety of statutory orders. *See* Working Paper, Chapter VII. We have concluded that no final recommendations should be made in this context. The application, if any, of judgment interest legislation to particular statutory orders should be left to the courts. *See also*, *Uniform Judgment Interest Act*, s. 5(2) in Appendix G.

[21] *Kanee* v. *Olma Bros. Realty (1973) Ltd.*, (1983) 49 B.C.L.R. 179 (B.C.S.C.); *Crestwood Kitchens Ltd.* v. *Vonh Bros. Const. (1974) Ltd.*, [1983] B.C.D. Civ. 2058-06 (B.C.S.C.); *Olmstead* v. *Curle*, [1978] B.C.D. Civ. *sub.* Mortgages & Foreclosure (B.C.S.C.).

[22] *Richardson Securities of Canada* v. *Shoji*, [1982] B.C.D. Civ. 144-03 (B.C.S.C.). Nor can interest be awarded under the *Interest Act* (Canada), R.S.C. 1970, c. I-18, s. 4, since a rate, albeit unenforceable, has been agreed upon. In such a case, the plaintiff will be awarded no interest, *but cf. Horsman Bros. Holdings Ltd.* v. *Dahl*, (1981) 125 D.L.R. (3d) 404; *Gillespie* v. *Baxter*, [1984] B.C.D. Civ. 984-05 (B.C. Ct. Co.). *See also* H.J. Kirsh, "Considerations Relating to the Interest Act and Pre-Judgment Interest Under the Judicature Act," (1981-2) 3 Adv. Q. 103.

[23] In *Belgium Farms Ltd.* v. *Schumaker*, [1983] B.C.D. Civ. 2058-07 (B.C.S.C.), the limitation of this exception to written waivers was avoided by characterizing the oral waiver as an "agreement." It would also appear that a claim for prejudgment interest may be abandoned orally at trial: *Tiffley* v. *Peterson*, [1980] B.C.D. Civ. 2058-06 (B.C.S.C.).

[24] Examples of interest payable under other enactments are found in the various provincial taxation statutes. *See, e.g., Gasoline Tax Act*, R.S.B.C. 1979, c. 152, s. 23(3).

(d) on an order for costs except to the extent that they consist of disbursements.

16. The Legal Profession Act *be amended to provide that a registrar's certificate given under Part 10 is a pecuniary judgment for the purposes of the New [Court Order Interest] Act.*

CHAPTER X WHO SHOULD AWARD PREJUDGMENT INTEREST?

A. Introduction

The *Court Order Interest Act* provides that "a court" shall add prejudgment interest to a pecuniary judgment. While the term "court" is not defined in the Act, in practice it has been interpreted as meaning *any* provincially constituted court, including the Court of Appeal. Recent amendments to the *Small Claim Act*[1] and the *County Court Act*[2] increase the monetary jurisdiction of the Provincial and County Courts by the amount of prejudgment interest awarded.

These amendments are arguably at variance with provisions of the *Interpretation Act*[3] and the *Supreme Court Act*.[4] Section 40 of the *Interpretation Act* provides that "so far as the terms defined can be applied," in any matter "relating to the legal proceedings" the interpretation section of the *Supreme Court Act* applies. By section 1 of the *Supreme Court Act*, "court" is defined to mean the Supreme Court of British Columbia, and hence it may be argued that only that court can award prejudgment interest.

These points do not appear to have been raised in any case of which we are aware. A number of arguments against applying these definitions can be raised:

(1) The *Court Order Interest Act* is particular legislation intended to confer a general power and should therefore override section 40 of the *Interpretation Act*.

(2) In view of the amendments to the *County Court Act* and *Small Claim Act*, the definition is "incapable of being applied" to the *Court Order Interest Act*.

(3) Use of the words "a court" as opposed to "the court" implies a broader grant of jurisdiction and therefore the definition is "incapable of being applied."

(4) The *Court Order Interest Act* does not "relate to a legal proceeding" since it does not govern procedure. It is in nature substantive legislation conferring a right to interest.

The broad definition given in practice to the words "a court" should be continued, and the cloud on the jurisdiction of the county and provincial courts removed. "Court" should be defined in a manner which includes any trial court.

B. The Court of Appeal

1. Generally

The British Columbia Court of Appeal is established by the *Court of Appeal Act*.[5] Section 9(1) provides:

> **9.** (1) On appeal the court may
>
> (a) make or give any order that could have been made or given by the court or
>
> (b) impose reasonable terms and conditions in an order, and
>
> (c) make or give any additional order that it considers just.

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[1] *Miscellaneous Statutes Amendment Act, No. 1*, S.B.C. 1984, s. 63.
[2] *Miscellaneous Statutes Amendment Act, No. 2*, S.B.C. 1984, s. 2.
[3] R.S.B.C., 1979, c. 205.
[4] R.S.B.C., 1979, c. 397.
[5] R.S.B.C. 1979, c. 74.1 (S.B.C. 1980, c. 7).

Subsection (9) confirms this broad grant of power:

> (9) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal, the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court and, where the appeal is not from the Supreme Court, the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.

Nothing in the *Court of Appeal Act* appears to prevent it from exercising the power to award prejudgment interest conferred by the *Court Order Interest Act* on a "court."

Where the Court of Appeal varies an award, or dismisses an appeal, should prejudgment interest be recalculated to the date of the appellate judgment? The point is important, since the effect could be to increase the rate of post-judgment interest beyond the 5% currently permitted by the *Interest Act* (Canada). The cases on point may be divided into a number of categories.

2. Appeals from the Dismissal of an Action at Trial

The first category concerns appeals by plaintiffs against the dismissal of their case. When such an appeal is successful, the order made by the Court of Appeal is the first which requires the respondent to pay money to the appellant. Accordingly, in *Lewis Realty Ltd.* v. *Skalbania*,[6] Hutcheon J.A. *per curia* held that the *Court Order Interest Act* applied throughout the period preceding the hearing of the Appeal. He then turned to the appropriate rate of prejudgment interest:[7]

> That is not the end of the matter. I must consider what rate is "appropriate in the circumstances". In my view the circumstances include the very important consideration that if the plaintiff had succeeded at the trial it would have been limited during the appeal period to interest at five per cent by the operation of the Interest Act of Canada. The plaintiff who lost at trial and succeeded on appeal or obtained an increase in the amount of the judgment ought to be in exactly the same position in the calculation to be made of interest on the pecuniary judgment.
>
> Accordingly, I would set the rate during the appeal period at five per cent.

The reasoning in *Lewis* is not wholly persuasive. The plaintiff who is successful at trial is not limited to 5% interest, since he may take steps to execute upon the judgment and put any money realized to immediate use. The Notice of Appeal does not constitute a stay of execution. If the defendant does apply for a stay, then it is open to the court to avoid the unfair rate of 5% by imposing terms or conditions on the stay which will ensure that the plaintiff receives in excess of 5%.[8] Accordingly, the unsuccessful plaintiff is in a worse position than the successful plaintiff if interest at 5% is to be awarded as a matter of course. He can do nothing to protect his position during the period between trial and appeal.

In *Bell* v. *Cessna Aircraft Co.*,[9] counsel mounted a direct assault on the decision in *Lewis Realty Ltd.* v. *Skalbania*. The Court of Appeal chose to affirm the result in *Lewis* and refused to order that a five man court reconsider it.

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[6] (1980) 25 B.C.L.R. 17 (B.C.C.A.).

[7] *Ibid.* at 20 *Cf. Bowen* v. *Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394, 412 (N.Z.C.A.) and *Guimont* v. *Williston*, (1980) 70 A.P.R. 178, 30 N.B.R. (2d) 178 (N.B.C.A.), in which it was held that in such cases Courts of Appeal should award prejudgment interest at full market rates.

[8] Such an order is commonly called a "*Robitaille*" order: *See Robitaille* v. *Vancouver Hockey Club, Ltd.*, (1980) 103 D.L.R. (3d) 85, 19 B.C.L.R. 268 (B.C.S.C.), *aff'd* (1980) 114 D.L.R. (3d) 568 (B.C.C.A.); *Court of Appeal Act*, *supra*, n. 5, s. 18; *Air Canada* v. *R. in Right of B.C.*, [1984] 5 W.W.R. 462, (1984) 58 B.C.L.R. 135, (B.C.S.C.).

[9] (1983) 149 D.L.R. (3d) 509, (1983) 6 W.W.R. 178, 46 B.C.L.R. 145 (B.C.C.A.).

3. The Judgment at Trial is Affirmed, and the Appeal is Dismissed

A second category of case concerns orders by the Court of Appeal which affirm the decision of the trial court and the amount of damages assessed by it. In *Abramovic* v. *Porter*, the court held that an order dismissing such an appeal was not a "pecuniary judgment:"[10]

> In my view, we did not here today make an order within the meaning of that provision. All we have done is dismiss the appeal and the order made below stands and the Court Order Interest Act does not apply in this case to the period between the judgment below and today.

Whether or not the dismissal of an appeal is a "pecuniary judgment," there is no compelling reason why the Court of Appeal should be denied the right to readjust the rate of interest. That may be done indirectly, as mentioned earlier, where conditions are attached to a stay of execution.

4. The Order Made at Trial is Varied

A third category of case concerns variations of the order made at trial. The amount of money ordered to be paid may be increased or reduced. If the damages are assessed at a lower amount, prejudgment interest will be calculated on the reduced judgment.[11]

In *Frietag* v. *Davis*,[12] the British Columbia Court of Appeal considered the proper course to take when an award of damages is increased. At trial, the plaintiff obtained a judgment for lost income to the date of trial. His claim for lost capacity to earn in the future was dismissed. On appeal, it was held that the plaintiff ought to have been awarded damages for that lost capacity, which the Court of Appeal fixed at $20,000.

The Court of Appeal in its judgment purported to apply the *Lewis* case, and to exercise its discretion under section 14 of the *Interest Act* (Canada) to order that interest run at 5% from the date of the trial court's judgment. It was stated that:[13]

> If the trial judge had awarded the $20,000, interest would have run from the date of trial to the date of appeal at the rate of 5 per cent under the *Interest Act*, s. 13:
>
> We can apply the principle enunciated in *Lewis Realty Ltd.* v. *Skalbania*, *supra*, by exercising the power contained in s. 14 of the *Interest Act*:
>
> > **14.** Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or of the giving of the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal.
>
> In this case we should "otherwise order". Interest should be calculated from the date of the judgment at trial.

Frietag is not an easy decision to understand. The *Lewis* case, which it purports to follow, proceeds, albeit *sub silentio*, on the proposition that a "judgment debt" arises only when the Court of Appeal disposes of the matter and triggers the application of the *Interest Act* (Canada). Until then, the *Court Order Interest Act* applies. If this is correct, then no question should arise of exercising discretion under section 14 of the *Interest Act* (Canada).

The powers of the Court of Appeal under the *Court Order Interest Act* call for clarification in legislation.

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[10] (1980) 25 B.C.L.R. 319, 321 (B.C.C.A.).

[11] *See Andrews* v. *Farrell Estates Ltd.*, (1985) 66 B.C.L.R. 275 (B.C.C.A.); *MacNutt* v. *Brown Bros. Ford Sales & Service*, [1985] B.C.D. Civ. 3465-03 (B.C.C.A.).

[12] (1984) 54 B.C.L.R. 112 (B.C.C.A.); *see also McNabb* v. *Mackeand*, (1981) 21 C.P.C. 90, 94-96 (Ont. H.C.).

[13] *Ibid.* at 113-4.

The Commission recommends:

17.(1) In the New Act, "court" should be defined to include the Court of Appeal, Supreme Court, County Court, or Provincial Court.

(2) The definition of "pecuniary judgment" should include an order allowing or dismissing an appeal, and an order varying an order given at trial, to the extent that the order involves the payment of money.

The effect of these recommendations is to confirm the decision in *Lewis*, so far as it concerns the status of Court of Appeal decisions, but under other recommendations, it would no longer be open to the court to reduce the interest rate as was done in that case.

One final point should be emphasized. The significance of the Court of Appeal's powers in respect of prejudgment interest turns in part on the present distinction between prejudgment interest and post-judgment interest. If both types of judgment interest were calculated on the same basis, then it would be quite irrelevant whether interest which accrued during the period between trial and appeal were characterized as pre or post-judgment interest.

C. The Registrar and the Master

The *Supreme Court Act* and the Rules of Court provide for the appointment of officers of the court called "registrars" and "masters." The registrar is charged with a number of quasi-judicial, administrative and support tasks. The registrars in particular are responsible for taxing bills of costs, and for taking accounts, assessing damages or inquiring into any matter.[14] If the court directs that the result be certified, it is binding on the parties.[15] Otherwise, it must be confirmed by the court,[16] which may vary the result or remit the matter to the registrar.[17] The master has the same power as the registrar in respect of these matters.[18]

The *Court Order Interest Act* makes only one reference to the registrar. Section 3 of the Act provides that:

> 3. Where an order is obtained by default under an Act or the Rules of Court, the registrar of the court may exercise and carry out the powers and duties of the court under this Act.

On one reading, section 3 might suggest that the registrar should approach each default judgment individually and fix a rate of prejudgment interest for a particular case in much the same fashion as a trial judge would fix the rate of prejudgment interest for the purposes of a case he has just dealt with. In practice, such a procedure would create enormous administrative difficulties and it has been the practice of the registrar to set a single rate which will apply to all default judgments taken throughout the province for the period that the rate is in force. In *James Halstead Limited* v. *Pacific Worth Distributors Limited*,[19] Southin J. observed:

> For some time it has been the practice of the registrar of the court . . . to issue a table of rates for various periods of time.
>
> I have grave doubts that section 3 empowers the registrar to make a blanket set of rates applying to all pecuniary default judgments. The registrar is exercising the powers and duties of the court and under section 1, the court in fixing the rates

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[14] *See* Rule 32, Rules of Court.
[15] Rule 32(2).
[16] Rule 32(3).
[17] Rule 32(4).
[18] Rule 53(2). It has been held in Ontario that this includes the power to award prejudgment interest, and that such an extension is constitutional: *Monaco* v. *Project Planning Associates Ltd.*, (1980) 4 A.C.W.S. (2d) 35.
[19] (1986) B.C.D. Civ. 2058-02 (B.C.S.C.).

> must surely consider each case according to the circumstances of that case. How the registrar can do what the judges cannot do, i.e., make a blanket rule, I do not know.

If the fixing of the rates of prejudgment interest were to remain a discretionary matter, these observations would suggest that some amendment to section 3 would be required to validate the registrar's practice. We have, however, recommended that interest rates should be fixed with reference to a stipulated market rate. In a later chapter we recommend that the registrar be responsible for ascertaining this rate. No amendment to section 3 is necessary.

CHAPTER XI

PREJUDGMENT INTEREST AND THE LEGAL PROCESS

A. Introduction

The mandatory addition of prejudgment interest to a pecuniary judgment has an obvious impact on the manner in which a lawsuit is conducted. Interest removes any incentive the defendant might have to delay and may, in some circumstances, positively encourage a defendant to explore the possibilities for compromise or satisfaction of the plaintiff's claim. It may also make more attractive the use of certain procedural techniques designed to bring pressure on the other party to settle. Three ways in which the likelihood of a trial may be reduced are:

(1) If the sum in issue is liquidated, it may be paid in full before trial.
(2) The defendant may pay money into court in satisfaction of the plaintiff's claim.
(3) A plaintiff may make a formal offer to settle.

This chapter examines the questions raised by the practical steps and legal procedures we have identified. It also examines the impact of pre-trial garnishment on the calculation of prejudgment interest.

B. Payment in Full

1. Tender

It is open to a defendant to avoid an action simply by tendering sufficient money to the would-be plaintiff to satisfy his claim. Such a course is obviously more practical when a liquidated sum is in issue. If the case involves an unliquidated claim, acceptance of the sum tendered is usually on condition that the action not be brought, or, that it be terminated. The parties have effectively compromised the action and any right to interest must be found in the compromise agreement.[1]

If the sum in issue is a debt, then the defendant may simply tender the amount due and owing. Tender is a technical defence to an action. If a tender before action is pleaded as a defence, it must be accompanied by a payment into court of the amount tendered.[2] If the defence of tender succeeds, then no judgment against the defendant will issue and no order will arise to which interest may be added. The defendant will, moreover, be entitled to his costs, which are paid out of the money paid into court. The balance, if any, is paid to the plaintiff.[3]

As our *Report on Settlement Offers* noted, certain enactments permit a "tender of amends" when a claim is unliquidated.[4] The theory behind these exceptional cases is the same as that underlying the defence of tender in cases of debt.

2. Acceptance of Tender

What if the tender of the whole or a part of the money in issue is made after an action is commenced and that tender is accepted? No judgment will result and since the *Court Order Interest Act* confers no independent right to

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[1] *See, e.g., Bernardo* v. *I.C.B.C.*, (1984) 55 B.C.L.R. 279 (B.C.C.A.); *R.* v. *Canadian Indemnity Co.*, [1983] B.C.D. Civ. 2058-01 (B.C.S.C.); *No. 8 Holdings Ltd.* v. *Vanwood*, 10 A.C.W.S. (2d) 309 (B.C.S.C.); *Re Billes*, (1983) 143 D.L.R. (3d) 55 (Ont. C.A.); *Oatwood Lumber & Millwork Co.* v. *Farnham Holdings Ltd.*, (1980) 17 C.P.C. 1 (Ont. H.C.); *Betteucourt* v. *State Farm Mutual Auto Insurance Co.*, (1985) 32 A.C.W.S. (2d) 71 (Ont. Dist. C.).

[2] Rules of Court, Rule 37(6).

[3] Rule 37(12).

[4] LRC 77, 1984.

interest in the absence of a judgment no prejudgment interest will be awarded.[5]

In England and the Australian state of Victoria, courts possess a discretion to award prejudgment interest even if the debt or obligation has been discharged in full before trial. The discretion is triggered by the commencement of an action. Section 35A(1) of the English *Supreme Court Act, 1981*,[6] states:

> 35A.—(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—
> (a) in the case of any sum paid before judgment, the date of the payment; and
> (b) in the case of the sum for which judgment is given, the date of the judgment.

This provision is based upon recommendations made by the English Law Commisson in its *Report on Interest*.[7]

In our Working Paper, extensive consideration was given to the power of the province to enact a statutory right to interest.[8] It was, and continues to be, our conclusion that the right of the province to do so is doubtful in the light of section 91(19) of the *Constitution Act,1867*,[9] and the jurisprudence which surrounds it. That doubt would extend to any scheme in which the court was empowered to award prejudgment interest when payment is made before action is commenced. There is little difference in principle between conferring a specific right to interest and conferring no such right but requiring a court to order its payment when action is commenced.

Legislation permitting the court to award interest on an obligation paid in full after action has been commenced, however, would be on a much surer footing. Once the assistance of the court is invoked, it should be able to fully and fairly settle matters between the parties. The omission of a power to award prejudgment interest on a debt paid in full as a result of an action having been commenced is a defect in the administration of justice which the province is competent to remedy.

On its face, the English legislation applies to payments in respect of both debt and damages. It is doubtful whether extending the court's jurisdiction to award prejudgment interest when payment is made in respect of damage claims is of practical significance. Damages are not, as a rule, liquidated. When they are paid in advance, and in full, there is generally accord and satisfaction. In British Columbia, the action is usually dismissed by consent, and formal releases are exchanged. In more complicated cases, other arrangements may be made. In each case, rights to interest ought to flow from the agreement between the parties.

3. Conclusion

It is our conclusion that courts should be empowered to order the payment of prejudgment interest once an action has been commenced, even if

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[5] *See Saikeley* v. *Royal Insurance Co. of Canada*, (1979) 98 D.L.R. (3d) 575, 24 O.R. (2d) 601 (Ont. H.C.); *Hubley* v. *Nova Scotia Bldg. Supplies Ltd.*, (1982) 29 C.P.C 202 (N.S.S.C.-T.D.). Similarly, when a payment into court is made under Rule 37 of the Rules of Court, and is accepted by the plaintiff, no judgment ensues and no prejudgment interest is added: *Haynes* v. *Fontaine*, (1980) 19 B.C.L.R. 51 (B.C.S.C.).

[6] Inserted by the *Administration of Justice Act, 1982*, c. 53; *see Practice Direction*, [1983] 1 All E.R. 934, [1983] 1 W.L.R. 377.

[7] Law Com. No. 88, (1978) Cmnd. 7229. The preferred solution to the perceived injustice was to enact a statutory right to interest. An alternate recommendation was that the court's discretion be broadened in the manner set out in present section 35A of the English *Supreme Court Act 1981*. This was rejected as the main recommendation, but was suggested in respect of a number of cases to which, it was concluded, the statutory right to interest should not apply.

[8] Working Paper at 26-38.

[9] *Constitution Act, 1867*, 30-31 Vict., c. 3.

payment in full is made before judgment is pronounced. The power should be limited to cases involving debt. Once the jurisdiction of the court is properly invoked, it should be able to grant full and adequate relief to the plaintiff. He should not be required to choose between turning down full payment or forgoing prejudgment interest.

Two practical matters require comment. Under our earlier recommendations, the court would not possess any discretion to refuse prejudgment interest once an action had been commenced. This does not limit the power of the parties to settle their dispute on the understanding that no prejudgment interest will be paid. Section 2 of the *Court Order Interest Act* provides that the Act does not apply when it is waived in writing or where the parties have made an "agreement about interest."

The second matter concerns the effect to be given to payment into court after a defense of tender before action. When a tender is refused, the plaintiff has only himself to blame for being kept out of his money. It was open to him to actively pursue payment of the debt. If he chooses not to, then there is no need to reward him to invoke the judicial system to remedy the effect of his own delay.

The Commission recommends:

18.(1) Under the New Act, a court should be obliged to order the payment of prejudgment interest on a debt:
(a) in respect of which an action has been commenced, and
(b) which is paid in full after the action was commenced,
from the date the obligation to pay arose to the date of payment, unless the parties otherwise agree.

(2) Paragraph (1) should not apply if payment is received as a result of the acceptance of a payment into court made pursuant to a defence of tender before action.

C. Payment into Court

1. Introduction

It is open to the defendant, at any time, to "pay into court a sum of money in satisfaction of the whole or part of the claim."[10] Rule 37 of the Rules of Court provides that the plaintiff may accept the payment in and tax his costs of the action up to seven days after the notice of payment in was received.[11] If the plaintiff declines to accept the payment in and continues with the action, he risks being deprived of his costs for the period commencing from receipt of the notice, and being compelled to pay the defendant's costs, if the judgment he recovers is equal to or less than the amount paid into court.

Section 4 of the *Court Order Interest Act* also provides for consequences should the plaintiff fail to accept a payment into court, and ultimately recover less than the payment in:

> **4.** Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains an order for an amount equal to or less than that paid into court, the court shall, notwithstanding section 1, award interest only as if the date of payment into court had been the date of the order.

Both Rule 37 and section 4 of the Act therefore require an answer to the question whether the plaintiff has recovered more by way of judgment than the amount paid into court. That question has arisen several times in British

[10] Rule 37(1).
[11] Rule 37(11).

Columbia in respect of the costs sanction of Rule 37. Cases dealing with the similar language of section 4 are rarer.

Unencumbered by authority, a sensible way to interpret these two provisions follows:

(1) The court makes its order, and calculates prejudgment interest to the date of the order.

(2) Counsel then brings the fact of a payment in to the attention of the court.[12]

(3) Applying the rate of prejudgment interest ordered, the court then calculates the *quantum* of the judgment as if its order had been made the day the notice of payment in was received. This involves reading the phrase "recovers an amount equal to or greater than the amount paid into court" as relating to the period up to the date payment in was made. If the judgment is equal to, or less than, the amount paid in, then section 4 would apply. If not, then prejudgment interest would be awarded to the date of the original order.

(4) Subsequent payments in would be treated in the same manner.

It was open on the wording of Rule 37 and section 4 for British Columbia courts to interpret them in the manner suggested. Unfortunately, courts have not adopted this approach. Instead, they have adopted the view that it is the ultimate order which must be compared to the payment in.

2. The Current Law

Initially, courts in British Columbia took the view that a payment into court included an amount to cover prejudgment interest which would accrue on the award. In *Legros* v. *Evans et al.*,[13] Macdonald J. rejected the view expressed by Lord Denning in *Jefford* v. *Gee*[14] that payments in do not include any sum for prejudgment interest, noting that the English legislation referred to payments in respect of a "cause of action."

In his judgment in *Jefford* v. *Gee* Lord Denning M.R. did not ignore the fact that a plaintiff faced with a payment which does not take prejudgment interest into account is placed in the unenviable position of choosing between forfeiting costs or foregoing prejudgment interest. To remedy this, the following rule of practice was laid down:[15]

> As a matter of practice, however, if the plaintiff is disposed to think that the payment into court will cover his claim, he will tell the defendant that he is disposed to go to trial in order to collect the interest: but that such a course would be to their mutual disadvantage because the revenue would extract tax on it: so it would be better for them to split the interest and settle for a sum somewhat higher than the sum in court.

This rule of practice has been glossed in the following way:[16]

> A plaintiff . . . could write an open letter to the defendant stating that he was satisfied with the money paid in as sufficient to satisfy his claim, then point out that the defendant had kept him out of the money and say he would take the money out if the defendant would pay the appropriate interest. He could also say that if the defendant refused to pay interest he would leave the money in, go on and draw the judge's attention to the letter and refusal when the judge considered costs. That letter would be a significant contemporary document and no doubt the judge would exercise his discretion under RSC ord 62, r 5, by giving the plaintiff costs.

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[12] Rule 37(21) prohibits counsel from doing this at an earlier point in the proceedings.

[13] (1977) 3 B.C.L.R. 395, 4 C.P.C. 38, 78 D.L.R. (3d) 752 (B.C.S.C.).

[14] [1970] 2 Q.B. 130, [1970] 1 All E.R. 1202 (C.A.).

[15] *Ibid.* at 150.

[16] *Butler* v. *Forestry Commission*, (1971) 115 Sol. J. 912 (C.A.); quoted in *Lochart* v. *MacDonald*, (1980) 44 N.S.R.(2d) 261, 83 A.P.R. 261, 267 (N.S.S.C., App. D.).

In *Evans Products Ltd.* v. *Crest Warehousing Ltd. (No. 2)*,[17] the British Columbia Court of Appeal considered the decision of Macdonald J. in *Legros*, and declined to adopt it. After citing *Jefford* v. *Gee*, with approval, Hinkson J.A. stated:[18]

> In my view that reasoning is equally applicable to the provisions of R. 37(1). As I have indicated, the *Prejudgment Interest Act* does not require that the claim for interest be pleaded in order for it to be recovered. It is no part of the debt or damages claimed. Therefore, with the greatest deference to Macdonald J., in my view, the defendant should not make any payment into court in respect of it.

The *Evans* case was regarded as settling this point[19] until the decision of a differently constituted Court of Appeal in *Kellner* v. *Greig*[20] In this case, Taggart J.A. *per curia* held that the decision of Hinkson J.A. in *Evans* was *obiter dicta*, and accordingly it was open to the court to take a different approach to reconciling prejudgment interest with payments into court. It was decided that the decision in *Legros* was correct, and that courts should no longer follow *Evans*. *Jefford* v. *Gee* was distinguished on a number of bases.

Taggart J.A. pointed out that a plaintiff will be reluctant to accept a payment in which does not account for prejudgment interest, and hence the efficacy of a procedure designed to facilitate settlements would be impaired. Taggart J.A. did not, however, mention the rule of practice laid down by the English Court of Appeal whereby a counter-offer to accept the sum paid plus further compensation for accrued prejudgment interest is given as a matter of course. Accordingly, the possibility of adopting a similar rule of practice in British Columbia was not considered.

One of the objections raised by counsel in *Kellner* v. *Grieg* to adopting the approach in *Legros* was that it made it extremely difficult for the plaintiff to calculate the amount he should pay in. The Court of Appeal's response to this point follows:[21]

> During the course of argument, there was some discussion as to the ability of the defendant to calculate what amount should be paid in by way of prejudgment interest. I think s. 4 of the Prejudgment Interest Act effectively cures any practical difficulties that the defendant might encounter by not knowing the date when judgment will be given and thus not knowing for what period prejudgment interest must be calculated. It is clear that where money is paid into court prejudgment interest is awarded only up to the date of payment-in where the plaintiff recovers an amount equal or less than the amount paid in. Thus the defendant knows that interest must be paid from the date when the cause of action arose to the date of payment-in; he knows the amount of the general damages which in his opinion is sufficient to satisfy the plaintiff's claim; and he knows what part of the general damages is a future pecuniary loss attracting no prejudgment interest. The only uncertain element is the rate of interest, but under the present practice with respect to the awarding of prejudgment interest that can be ascertained by reference to the information provided all registrars. Thus I see no substantial practical difficulties which face a defendant wishing to obtain the protection afforded by R. 37(1) and (17).

It would appear that the Court of Appeal did not fully understand counsel's concern. Section 4 undoubtedly applies to limit the recovery of prejudgment interest. However, that fact is relevant only if the court compares the award it would have made had it given judgment at the date of payment in. In *Kellner* v. *Greig*, however, the court compared the amount paid in to the

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[17] (1978) 6 B.C.L.R. 177 (B.C.C.A.).
[18] *Ibid.* at 180.
[19] *See e.g. Veronneau* v. *Gregory No. 2*, (1979) 13 B.C.L.R.42 (S.C.B.C.); *Husulak* v. *Hudson Bldg. Supplies Ltd.*, [1978] B.C.D. Civ. *sub.* Practice (B.C.S.C.).
[20] (1979) 15 B.C.L.R. 126, 11 C.P.C. 69, 103 D.L.R. (3d) 244, [1980] I.L.R. 1-1175 (B.C.C.A.).
[21] *Ibid.* at 138 (B.C.L.R.).

ultimate judgment.[22] The nub of the plaintiff's complaint was not that it could not calculate at any given date what amount of prejudgment interest has accrued, but rather its inability to predict the date at which interest will cease to run for the purpose of assessing the adequacy of the payment in.[23] Section 4 gives no guidance on the time at which the comparison should be made. In *Choboter* v. *Reimer* Southin J. noted:[24]

> In consequence of the decision of the Court of Appeal in *Kellner* v. *Greig*, *supra*, defendants now pay into court an amount intended to cover court order interest and, indeed, the form in the Rules now so provides. The difficulty is that, to determine whether a defendant has paid in too little, one must choose a date to which to calculate the interest; if one calculates it to a payment in date which may be a year or more before judgment, the amount may be sufficient while, if one calculates it to judgment, it is insufficient. I do not think the Court of Appeal addressed this difficulty when in *Kellner* v. *Greig* it, in effect, rejected the thesis of *Evans Products Ltd.* v. *Crest Warehousing Ltd.*

A response to the Working Paper also made the following observations:

> It is impossible for a defendant paying into court to judge accurately what amount to allow for interest that may accrue between payment in and trial. This is due to both fluctuating interest rates and to the uncertainty of trial dates, expecially on the assize system outside Vancouver. If the defendant allows for future interest and the plaintiff accepts it immediately, he is paid too much. The only safe way is for the defendant to wait until the eve of trial. It is in everyone's interest to see early payments in to clear the trial list.

3. An Evaluation of the Current Law

The law respecting payments into court, as set out in *Kellner* v. *Greig*, creates a number of difficulties:

(1) Comparing the ultimate award to the payment in diminishes the impact of refusing to accept the payment in. The longer it takes to get to trial, the less the plaintiff need fear the sanction of costs and loss of prejudgment interest.

(2) If the comparison is made to the judgment obtained at trial, the defendant must try to predict
   (a) how long it will be before the court makes its final order,
   (b) the rate of interest that will apply, and
   (c) the *quantum* of the damages to be assessed.

(3) Even if the defendant successfully predicts these three variables, the result will be payment into court of an amount which includes compensation to the plaintiff for being kept out of money to the date of trial. If the plaintiff accepts the payment before that date, he is overcompensated.

(4) Section 4 was never intended to govern the process of comparing the eventual judgment and the payment in. The question it raises is whether the plaintiff ought to have accepted the payment in. If he had done so, he would not have been kept out of his money. It is the continuing accrual of prejudgment interest which the defendant attempted to stop by the payment in. It is unfair to measure the plaintiff's success by including prejudgment interest notionally payable after payment in.

Our *Report on Settlement Offers* concluded that the present approach taken by courts respecting prejudgment interest and the payment of money into court was unsatisfactory. It was recommended that:

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[22] A practice it confirmed in *Ellis* v. *Whitepass Transportation Ltd.*, (1983) 43 B.C.L.R. 103 (B.C.C.A.). A similar rule is adopted in Victoria: *Murphy* v. *Murphy*, [1963] V.R. 611 (S.C.V.) and Queensland: *(Hadzigeorgiou* v. *O'Sullivan*, [1983] Qd. & R. 55 (Full Ct.). *Cf. Moore International (Canada) Inc.* v. *Carter*, (1982) 41 B.C.L.R. 396 (B.C.S.C.) in which Legg J. compared the amount paid in with the principal sum of the judgment plus prejudgment interest to that date. *Kellner* v. *Greig* was not, however, referred to by the court.

[23] The position in Ontario has yet to be resolved. Courts have held that prejudgment interest ought not to be considered: *Moroziuk* v. *Boon*, (1979) 108 D.L.R. (3d) 607, 28 O.R. (2d) 130 (Ont. Co. Ct.).

[24] (1985) 65 B.C.L.R. 208, 214 (B.C.S.C.).

> To determine whether increased costs should follow refusal of an offer to settle or payment into court that is silent on interest, the court should not take into account interest arising after the date of the offer to settle or payment into court.

That Report was silent on the desirability of continuing to add the sanction of depriving a plaintiff of prejudgment interest should he refuse to accept a reasonable payment into court.

4. Payment into Court and Consequences for Prejudgment Interest

In our 1973 *Report on Pre-judgment Interest*, the inclusion of a provision comparable to section 4 of the *Court Order Interest Act* was recommended:[25]

> If, however, the plaintiff recovers less than the amount paid in, it seems unreasonable that the defendant should be required to pay any interest accruing after the date of payment into Court. . . .
> The plaintiff who fails to accept a sufficient payment into Court has deprived himself of the use of the money. Any solution advanced must be consistent with the dictates of common sense, and common sense requires that the plaintiff not recover interest after the date of payment into Court, where he recovers less than the amount so paid in.

This reasoning is still persuasive, and there appears to be no reason to depart from this approach.

In view of *Kellner* v. *Grieg*, however, it is necessary to be more specific concerning the time at which the comparison should be made. It is consistent with the rationale underlying section 4 and Rule 37 that the determination of whether the plaintiff has recovered an amount greater than that paid into court ought to be made at the date of payment in.

The Commission recommends:

19.(1) The policy of section 4 of the Court Order Interest Act *should be carried forward in a provision of the New Act.*

(2) For the purposes of that provision, in determining whether the plaintiff has recovered a judgment greater than the amount paid into court under Rule 37 of the Rules of Court, the court should not take into account prejudgment interest accruing after the date of payment into court.

D. Offers to Settle

The 1976 Rules of Court introduced a new procedure which gave a plaintiff a tool intended to penalize a defendant who refuses to accept a reasonable offer to settle. Under Rule 57(13) the plaintiff may deliver a formal offer to settle to the defendant. The defendant may accept the offer either by paying the sum stipulated by the plaintiff into court[26] or by consenting to judgment.[27] If neither step is taken, then the plaintiff may be awarded up to double costs of the action.[28]

In 1984 we submitted a *Report on Settlement Offers*[29] aimed at rationalizing and extending this procedure. In particular, it was recommended that the procedure should permit the person making an offer to settle to stipulate for the running of prejudgment interest as part of the offer. Recommendations were also made which would permit offers to be made by defendants and in respect of non-monetary relief.

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[25] LRC 12 at 23-24.
[26] Rule 57(14).
[27] Rule 57(17).
[28] Rule 57(18).
[29] LRC 77, 1984.

Our *Report on Settlement Offers* was silent on the question of whether the refusal of either party to accept a reasonable offer to settle ought to be visited with consequences other than penalties involving costs. Our 1973 *Report on Pre-judgment Interest* contained a discussion respecting informal offers to settle, and rejected any recommendation that a plaintiff who refuses an informal offer to settle should be deprived of prejudgment interest. A defendant who makes an offer still has control of the funds and their use. The policy in favour of compensating the plaintiff overrode the policy in favour of promoting an end to litigation. A similar result should follow upon the introduction of a formal offer to settle by a defendant.

In the case of the plaintiff's offer to settle, no question arises of depriving the plaintiff of prejudgment interest since it is the defendant's conduct which is in issue. In that regard, no case can be made for increasing the amount of prejudgment interest to penalize the defendant. The only sanction should be in costs.

Accordingly, no recommendations are made in this Report respecting any sanction involving prejudgment interest attendant upon a refusal by either party to accept an offer to settle.

E. Pre-Trial Attachment of Debts

In *Sehlstrom* v. *Pich*[30] the plaintiff succeeded by way of pre-trial garnishment in having the sum of $28,000 paid into court to await the outcome of the action. The plaintiff was ultimately successful, and the issue arose whether prejudgment interest should be added to the award in respect of the sums paid into court. Oppal L.J. held that it should:[31]

> This was a clear case where the defendants wrongfully converted to their own use, certain funds which were rightfully the property of the plaintiff. The purpose of the [*Court Order Interest Act*] is surely to compensate the plaintiff for the lack of the use of funds, which were rightfully his. The plaintiff had a clear right to these funds. The fact that the plaintiff chose to garnishee the funds and thereby securing the same pending trial surely does not deprive him of interest on funds which are rightfully his. Moreover the fact that this case was decided upon the issue of credibility does not detract from the plaintiff's claim for interest. It is agreed that no interest will ordinarily be paid on moneys paid pursuant to a garnisheeing order, but surely this Rule applies to the Minister of Finance, not to any unsuccessful litigant of a pecuniary claim.

When pre-trial garnishment attaches funds which are then paid into court, but which do not, under our Rules of Court, attract interest, then both parties have been deprived of the use of the funds. If the money in court earned interest, then, when paid out to the plaintiff with interest, it would at least discharge a portion of the defendant's obligations to pay prejudgment interest.

In our *Report on Settlement Offers*, it was stated that:[32]

> There would appear to be no reason why all monies in Court should not bear interest. The only conceivable objections to that approach are that the registries have not the ability to calculate interest on monies deposited for short periods of time, or that the courts are not in a position to reinvest money in order to earn interest on it. Neither objection is without solution. Presumably the Ministry of Finance has sufficient expertise to provide the registries with systems for determining interest entitlement. Deposit of monies in an interest bearing account is an obvious method of reinvesting monies paid into court.

These views attracted favourable comment. It was generally agreed that money paid into court to facilitate settlement of litigation should earn interest.

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[30] (1983) 36 C.P.C. 79 (B.C.S.C.). *See Williams* v. *Volta*, [1982] V.R. 739 (S.C.V. Full Ct.).
[31] *Ibid.* at 80.
[32] *Supra*, n. 29.

It was concluded, therefore, that Rule 58 of the Rules of Court governing interest on funds in court should be revised. Rule 58 presently provides that "funds in court" attract interest at the prime lending rate of the Province's banker, less 2%. "Funds" is given a restrictive definition and is limited to money paid into court on execution proceedings, as security for costs, in satisfaction of a claim, or for bail. We accordingly recommended that:[33]

> Monies paid into court pursuant to Rule 37 or Rule 57 should be "funds" within the meaning of Rule 58.

The same rule should apply to funds paid into court by reason of a garnishing order.

The Commission recommends:

20. The definition of "funds" in Rule 58(1) of the Rules of Court be amended so as not to exclude money paid into court pursuant to a garnishing order.

We stress that the interest which funds in court might attract would not be in substitution for prejudgment interest. That interest would, however, be taken into account in calculating the defendant's remaining liability on the judgment after payment out of court to the plaintiff had been made.

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[33] *Ibid.* recommendation 7.

CHAPTER XII POST-JUDGMENT INTEREST

A. Introduction

Under the *Interest Act* (Canada)[1] post-judgment interest is payable on judgments obtained in any of the four western Provinces at the rate of 5% per annum. Elsewhere in Canada, post-judgment interest is payable under provincial statutes at more economically realistic rates.

The *Interest Act* is federal legislation. The federal government has indicated on several occasions its intent to repeal *inter alia* those portions of the the *Interest Act* dealing with post-judgment interest. Indeed, late in the life of a recent Parliament, such a bill was introduced, but was not enacted before the dissolution of the House.[2]

In British Columbia, legislative steps have been taken to replace the provisions of the *Interest Act* with amendments to the *Court Order Interest Act*. The amendments are as follows:

1. The imposition of a minimum rate of 5% is repealed.[3]
2. A post-judgment interest rate equivalent to the government banker's prime rate is established.[4]
3. Post-judgment interest is paid at simple rates.[5]
4. The interest rate is set for 6 months at a time from January 1 and July 1 of each year.[6]
5. The amendments apply to existing judgments from the date the amendments come into force.[7]
6. The court may vary the rate of post-judgment interest or the period within which it is payable.[8]
7. Interest is part of a judgment for enforcement purposes.[9]
8. Payments on judgments are to be applied firstly to interest.[10]

The amendments come into force on the date the *Interest Act* provisions cease to have effect in British Columbia.[11]

Quite apart from the provisions of the *Interest Act* respecting post-judgment interest, a practice has developed in British Columbia under which courts add to a judgment for damages respecting lost income or future expenses a percentage of the judgment to the date of payment. This type of order is known as a "*Larocque*" order, after the case in which the practice was approved by the British Columbia Court of Appeal — *Larocque* v. *Lutz*.[12] The rationale underlying *Larocque* orders turns on the assumptions inherent in the practice of discounting lump sum judgments to reflect the early receipt of the money in issue. It was explained by Lambert J.A. in the *Larocque* case as follows:[13]

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[1] R.S.C. 1970, c. I-18.
[2] Bill C-36, *An Act to Amend the Interest Act*, s. 4.
[3] *Court Order Interest Amendment Act, 1982*, S.B.C. 1982, c. 47.
[4] *Ibid.* s. 5.
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*, s. 6. Arguably, the *Interest Act* provisions ceased to have effect in British Columbia when the *Charter of Rights and Freedoms* came into force. In *The Board of Trustees of Fort McMurray Roman Catholic School District No. 32* v. *The Board of Trustees of Fort McMurray School District No. 2833* (unreported, 18 Feb. 1986, Alta. Q.B., M.C., action no. 8303 26095) it was held ". . . section 13 of the Interest Act can no longer stand in light of section 15 of the Charter. Section 13 is indefensible discriminatory legislation based solely on accidents of history." *See* E. Meehan, "Post-Judgment Interest—Avoiding the Canada Interest Act—Unconstitutional," (1986) 24 Alta. L. Rev. 376.
[12] (1981) 29 B.C.L.R. 300, 307 *et seq.* (B.C.C.A.); *see also Smith* v. *Horizon AeroSports Ltd.*, [1982] B.C.D. Civ. 2058-07 (B.C.S.C.); *Haggman* v. *Milligan*, [1984] B.C.D. Civ. 3337-09 (B.C.S.C.); *Herman* v. *Bradshaw*, [1984] B.C.D. Civ. 3380-02 (B.C.S.C.); *Mandzuk* v. *Vieira*, [1984] B.C.D. Civ. 2061-01 (B.C.S.C.).
[13] *Ibid.*

> Ruttan J. gave judgment on 1st October 1979. That judgment has not been paid. In the words of counsel in *Fenn* v. *Peterborough* (1979), 25 O.R. (2d) 399, 9 C.C.L.T. 1 (C.A.), the actuarial evidence has become a myth. The fund which the actuary, Mr. Collisbird, contemplated would be set up at the time of trial was not set up. The interest that would have been earned on that fund is required in the initial years both to sustain the lost income stream for which compensation is given and also to augment the capital, so that over the years of the plaintiff's working life the fund will be sufficient to maintain that income stream against the erosion of inflation.
>
> Since 1st October 1979 the plaintiff has not received the income stream that is represented by the capital sum that she was awarded, and the fund has not been augmented. If the award of $53,700 for the loss of future earning capacity were paid now, together with 5 per cent post-judgment interest under the *Interest Act*, R.S.C. 1970, c. I-18, the plaintiff would not receive a large enough fund to provide the income stream of $2,800 each year, indexed for inflation, for the remaining 43 years, approximately, of her work life, that Ruttan J. sought to award her.
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> . . . [I]t is my opinion that, where a capital sum is awarded that is computed on the basis that it will provide an income stream, it is the proper course for a trial judge to provide that, if the capital sum is not paid within, say, a month of the date of pronouncement of his judgment, the amount awarded will increase in accordance with a formula that he should specify in his judgment. The increment would continue until the judgment was discharged by payment or until the amount of the award was paid into an interest-bearing account, to be held for the benefit of the plaintiff and paid out in accordance with the result of the appellate process. The formula may be simply to add an amount to the capital sum, either on a daily basis or at specified intervals, that would be equivalent to the amount that the capital sum would have earned in interest if it had been in the hands of the plaintiff and invested in a way that would provide the income stream that the trial judge contemplates should be provided, with the appropriate assumptions about the investment vehicle and the reinvestment and compounding period. But there may be circumstances where a different or more complex formula would be required.

Lambert J.A. went on to hold that the precise adjustment to be made was a question of fact, and that normally the increment would be compounded in order that it more closely mimic the actuarial assumptions on which the lump sum award was based.

In making the *Larocque* order, the court exercises its jurisdiction to assess damages in a manner which is akin to an award of post-judgment interest at compound rates. The judgment in *Larocque* is, however, silent on the possible application of judgment interest to the accretions to the damage award contemplated by a *Larocque* order. In *Paulak* v. *Doucette*,[14] this factor was taken into account in part by assessing damages at the rate of 11%, less 5% for post-judgment interest.

B. An Evaluation of the Amendments to the Court Order Interest Act Respecting Post-Judgment Interest

The amendments to the *Court Order Interest Act* respecting post-judgment interest retain the main features of the *Interest Act* and of other provincial legislation dealing with post-judgment interest. A sharp distinction is drawn between pre and post-judgment interest. Canadian law has always accorded a special significance to the fact of a judgment having been given. There are very practical reasons for doing so. Any cause of action arising out of the litigation is merged in the judgment. When an order is made, the rights of the plaintiff and defendant are limited to those expressed in the court order. Except in rare cases, the matters may not be relitigated.

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[14] [1985] 2 W.W.R. 588 (B.C.S.C.); *Seamen* v. *Ritchter*, unreported, (B.C.C.A.), June 14, 1985, Van. Reg. No. CA002504.

Before the enactment of prejudgment interest legislation, the rendering of a judgment often marked the first point at which the plaintiff became entitled to interest in the absence of a contract or a statutory right to that effect. Moreover, a judgment usually is the first point at which a plaintiff may invoke judicial process to assist him in executing upon the assets of the defendant to enforce an order for the payment of money. A whole panoply of remedies attends upon the pronouncement of a judgment.

In Canada, the sharp distinction between pre and post-judgment interest in part reflects the divided jurisdiction over interest on judgments. In the four western provinces, post-judgment interest is governed by the *Interest Act*, sections 12-14. Under those sections, every judgment pronounced in British Columbia bears interest at 5% per annum from the date of the verdict or order. By section 14, the court possesses a limited discretion to vary the date from which interest will commence. The rationale underlying that discretion is difficult to discern.

As this Report demonstrates, modern prejudgment interest legislation is much more sophisticated. Unlike post-judgment interest, in calculating the *quantum* of an order for the payment of money, distinctions will be drawn between various types of loss for the purpose of calculating prejudgment interest. In contrast, all those principal amounts and any prejudgment interest payable, whether statutory or consensual, are lumped together into a single sum for the purpose of calculating post-judgment interest at the statutory rate of 5%.

When the *Interest Act* provisions cease to have effect in British Columbia, the question of post-judgment interest will be a matter for the Province. There will no longer be a constitutional reason to subject pre and post-judgment interest to different rules. Is that course nevertheless justifiable? This question arises in two contexts:

(1) Should there be different rates of pre and post-judgment interest?
(2) Should the payment of post-judgment interest at statutory rates on all principal sums be mandatory?

The provisions of the *Court Order Interest Amendment Act, 1982* perpetuate the approach taken to both these questions by the *Interest Act*. Post-judgment interest at the statutory rate is mandatory. No provision is made for parties to set their own rates of post-judgment interest.

C. Reconciling Pre and Post-Judgment Interest

Section 7 of the *Court Order Interest Amendment Act, 1982* provides that post-judgment interest is to be simple, and payable at the prime rate charged by the Province's banker. This rate was adopted earlier in this Report as the basis on which an appropriate rate of prejudgment interest might be calculated. It is difficult to see why a different rate should apply post-judgment. The trend in other jurisdictions such as Ontario,[15] England,[16] and the view taken by the Uniform Law Conference[17] in its *Uniform Judgment Interest Act*, is to establish a uniform rate for both kinds of judgment interest.

While simple interest is most compatible with the present methods of calculating post-judgment interest, the difficulties associated with calculating compounding interest may be met through the use of the multiplier system we recommend.

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[15] *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 137, s. 139.

[16] By a practice direction, [1983] 1 All E.R. 934, [1983] 1 W.L.R. 377, prejudgment interest claimed is "not to exceed the rate of interest on judgment debts. . . ." (at 935, All E.R.).

[17] Section 1 defines a single "interest rate" applicable to pre and post-judgment interest.

The Commission recommends:

21. Post-judgment interest should be levied at the same rate, and compounded in the same manner, as prejudgment interest.

The jurisdiction to make *Larocque* orders is a useful one. It takes into account the manner in which damages are assessed when a sum is discounted to a present value. While the recommendations that judgment interest be compounded may reduce the need for such orders, it may not eliminate them entirely. Much will depend on the actuarial evidence led at trial. The *Court Order Interest Act* should specifically accommodate this form of damages.

The Commission recommends:

22.(1) The power of British Columbia courts to make Larocque *orders should be preserved. The New Act should provide, therefore, that nothing in it prevents a court from awarding damages, in whatever manner it sees fit, which compensate a plaintiff for delay in payment of a capital sum whose value has been discounted in accordance with actuarial practice.*

(2) When such damages are awarded, no post-judgment interest should be payable on the portion of the judgment in respect of which such damages are assessed.

Section 5 of the *Court Order Interest Amendment Act, 1982* would give the courts a discretion to vary the statutory rate of post-judgment interest. The role of such a discretion with respect to prejudgment interest was discussed in Chapter III. Our conclusion that the courts should have no such discretion applies with equal force to post-judgment interest. We believe this is covered by recommendation 21. This conclusion is subject to the same exception we identified in Chapter III concerning foreign interest rates.

The Commission recommends:

23. Where a judgment is stated in a foreign currency, or its Canadian equivalent at the date of payment, the court should have a discretion to fix an appropriate rate or rates of post-judgment interest.

D. Should the Payment of Post-Judgment Interest be Affected by an Agreement about Interest?

Should an agreement about interest override the *Court Order Interest Act* respecting post-judgment interest? Under the present law, the contract has no effect after judgment. The plaintiff is entitled to post-judgment interest at the statutory rate of 5%, whatever the contract may state.[18] If the *Court Order Interest Amendment Act, 1982* comes into force, the court would have a limited discretion to give effect to part of such a contract.

At the time our Working Paper was settled, internal debate had generated three different views on the weight a contract about interest should be given after judgment. No particular view enjoyed majority support. We had hoped that the responses to the Working Paper might provide guidance on this issue.

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[18] *Edelwiess Credit Union* v. *Boehm*, (1978) 8 B.C.L.R. 51 (B.C.S.C.); *Norfolk Trust* v. *Wolcoski*, (1982) 38 B.C.L.R. 130 (B.C.C.A.); *First Western Capital Ltd.* v. *Wardle*, (1984) 31 R.P.R. 225 (B.C.S.C.); *Canada Permanent Trust Co.* v. *King Art Dev. Ltd.*, [1984] 32 Alta. L.R. 1 (1985) 12 D.L.R. (4d) 161 (Alta. C.A.); *Value Industries Ltd.* v. *Sound Investments Inc.*, Unreported, B.C.C.A., Van. Reg. No. F771616; *C.I.B.C.* v. *Fed. Bus. Dev. Bank*, (1985) 36 Alta. L.R. (2d) 186, 191 (Alta. Q.B.). *See also* E. Meehan, "Post-Judgment Interest — Avoiding the Canada Interest Act — Not Any More — For Now," (1984) 22 Alta. L. Rev. 469.

The response was not helpful. Many correspondents did not address the issue at all. Others simply agreed that there was much to be said on all sides of it. Correspondents who did comment on this issue tended to be equally divided in their views.

We have, not without difficulty, reached a conclusion which stands as our final recommendation. This conclusion is that a judgment should attract interest in accordance with the agreement upon which the judgment is based. In fixing the rate and manner of calculation of interest, the parties have expressly considered the risks inherent in the transaction and the law should be slow to interfere with the result they have agreed on. Unless this result is contrary to law, and therefore invalid, or is otherwise unenforceable, the bargain made by the parties should stand. It is anomalous to require a person to forgo contractual rights he has come to court to enforce.

We recommended earlier that statutory prejudgment interest should not be payable if the parties have made an agreement about interest. The reasoning behind that recommendation applies with equal force after judgment. The fact that a judgment has been given does not alter the functional nature of the relationship between plaintiff and defendant. They remain debtor and creditor, and post-judgment interest legislation should recognize that reality.

Post-judgment interest should not be regarded as a "debtor protection" measure. The statutory, common law, and equitable rules applicable to lending currently provide a significant measure of protection.[19] If the cost of borrowing is to be further controlled, this ought to be done directly.

We also reject any argument that being restricted to a statutory rate of interest is a price that the plaintiff should pay for access to the execution process. In ordering the payment of money, and issuing execution process, the court merely compels the defendant to do what he ought to have done of his own accord to satisfy the plaintiff's claim. The plaintiff should not be required to forgo his future rights to interest at the contractual rate if he is to receive the court's assistance in enforcing his past rights under the same contract.

There may be some administrative difficulties inherent in allowing an "agreement about interest" to have effect after judgment but they should not be overstated. The multiplier scheme will, in any event, lead to changes in the practice of the sheriff and court officials. It may be doubted whether the majority of contract cases will call for calculations more difficult than those required by the present law, and even if they do, the practice of issuing execution process could be modified to remove the burden of verification from court officers. For example, the filing of an affidavit verifying interest calculations, and any facts on which they are based, could become standard practice. It should be remembered that similar questions arise currently when action is brought to recover prejudgment contractual interest, and they present few difficulties.

There remains a question respecting the kind of contract that should displace post-judgment interest at the statutory rate. In the Working Paper it was observed:[20]

> This approach might be implemented in one of two ways. Reforming legislation could provide that any agreement about interest would preclude statutory pre and post-judgment interest. Alternatively, post-judgment interest could be excluded only when the contract specifically provides for post-judgment interest.

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[19] *See, e.g., Consumer Protection Act* (1967), R.S.B.C. 1979, c. 64, *Consumer Protection Act*, R.S.B.C. 1979, c. 65. The common law doctrine of unconscionability was expanded by the British Columbia Court of Appeal in *Harry v. Kreutziger*, (1979) 95 D.L.R. (3d) 231. *See also Criminal Code*, s. 305.1.

[20] Working Paper at 299.

We are attracted by the latter suggestion, but are concerned that to require a specific reference to post-judgment interest in a contract might place too great a burden on the lender. It should be sufficient if the contract states that a stipulated interest rate is to apply "after default" or uses similar language. Such a formulation is quite common in commercial agreements and it should be given effect for the purposes of post-judgment interest.

The Commission recommends:

24.(1) If there is an agreement concerning interest after judgment, that agreement should govern the entitlement of the parties to post-judgment interest rather than the New Act.

(2) For the purposes of paragraph (1), an agreement concerning interest after judgment includes an agreement containing provisions respecting interest that are stipulated to apply after default.

E. A Subsidiary Issue

The *Court Order Interest Amendment Act, 1982* provides that:

> **9.** (1) Interest under this Part shall be deemed to be included in the judgment for enforcement purposes.
>
> (2) A partial payment of a judgment shall be applied first to outstanding interest owed on the judgment.

Subsection 9(1) is declarative of the present law, and we are content to adopt a similar rule.

The Commission recommends:

25. Interest under the New Act should be deemed to be included in the judgment for enforcement purposes.

The manner in which interim or partial payments on account are to be applied to the amount outstanding depends on the method of calculating judgment interest to be adopted. Chapter XIV, describes the names of application in the context of our multiplier scheme. No recommendation respecting the application of interim payments to a judgment is, therefore, made in this chapter.

CHAPTER XIII CALCULATING JUDGMENT INTEREST: THE MULTIPLIER SCHEME

A. Introduction

Calculating prejudgment interest under the *Court Order Interest Act* can be a complex task, particularly when the court has ordered that interest rates fluctuate at given intervals. Under the recommendations made in this Report, judgment interest will fluctuate as a matter of course. Other sources of potential difficulty may be isolated. The allocation of past pecuniary loss to a specific period, with interest to run from the end of that period, accounting for interim payments, and the lower rate of prejudgment interest applicable to non-pecuniary loss, may also introduce further complications into the calculation of prejudgment interest. Finally, a recommendation that court order interest should be compounded rather than calculated as simple interest adds a whole new dimension of complexity.

Complex calculations are inevitable if the *Court Order Interest Act* is to reflect the proper economic role of judgment interest. This complexity became a matter of concern to us very early in the course of this study. It was clear that the kinds of changes that seemed desirable to rationalize the Act from an economic viewpoint would generate calculations likely to overwhelm all but the most mathematically sophisticated. The present approach to the calculation of judgment interest, which puts the burden of computation on the "end user," would have to be abandoned in favour of some more workable alternative.

We believe that we have developed a scheme which meets the requirements of all concerned. It consists, in essence, of tables of pre-calculated "multipliers" which may be used to ascertain the dollar value of the plaintiff's claim at the date of trial and at any time after the date of judgment, inclusive of judgment interest. These tables would be generated with the aid of a computer and would shift the burden of computation from the end user to the machine. It should, therefore, greatly simplify the kinds of computations which must be made by, or on behalf of litigants.

The preparation of such tables is made possible by our conclusion that judgment interest should be payable at statutory rates. These rates apply to all amounts ordered to be paid in a judgment. It is possible to express the value of one dollar, with judgment interest, from the date the money ought to have been paid, to any other date, as a single figure — the multiplier. Tables of multipliers may then be prepared to which reference can be made to determine the dollar value of a judgment.

It is important to stress that the use of a table of multipliers is not a new and radical method of awarding judgment interest. Instead, it is intended simply as an easier method of calculating the *quantum* of judgment interest payable. It would be possible, for example, to graft a multiplier scheme onto the existing *Court Order Interest Act* (at least so far as the "registrar's rates" fix the interest rates). The multiplier scheme is simply a mechanical method of ascertaining court order interest. The actual figures which appear as entries in the table will reflect the various economic assumptions and data underlying the table. The factual underpinnings of a table of multipliers may be relatively simple and straightforward or they may be sophisticated and complex. For example, the effect of compounding would be manifested by assigning to each multiplier a slightly higher value than would be the case if the table embodied simple interest. Compounding, thus, would impose no greater burden on the

end user than the alternative assumption. All tables would be used in exactly the same way whatever the underlying assumptions.

A significant advantage of using a table of multipliers is that it eliminates the necessity of making a series of calculations to determine the *quantum* of judgment interest payable in respect of a given sum. The multiplier itself reflects the accrual of interest from the relevant date to the date the order was made. It need only be multiplied by the amount in issue. Counsel is thereby relieved of the tedious task of making interest calculations for each different rate that might have been in force during the prejudgment period.

B. Preparation of the Table of Multipliers

Earlier it was recommended that pre and post-judgment interest be based on the prime rate of interest charged by a specified chartered bank. While this prime rate is fair, when compounding it is important to do so on a basis consistent with the interest rate chosen. In commercial practice, the prime rate is most closely identified with semi-annual compounding. In developing the multiplier scheme and in preparing the tables of multipliers, however, we found it more convenient to work with monthly compounding. Conceptually, the model is simplified when the compounding period coincides with the periods for which multipliers are provided. It became necessary, therefore, to balance the effect of monthly, rather than semi-annual compounding, through a small downward adjustment of the interest rate. The tables of multipliers we have prepared are based on the prime rate, less ¼%, compounded monthly. We recognize that lowering the prime rate by ¼% will not exactly neutralize the effect of monthly compounding for all prime rates, but this adjustment is accurate for prime rates around 12%. Any inaccuracy such an adjustment entails for other possible prime rates we think may be safely regarded as *de minimis*.

It has also been decided that the table of multipliers which would apply to damages for non-pecuniary loss should not be adjusted in a similar fashion. Earlier in this Report, it was recommended that the prejudgment interest rate on such loss be set at 3½%. This rate is nominal, and for that reason, there is little to be gained in "accuracy" by adjusting it to take into account monthly compounding.

Using the two interest rates discussed above, we have produced two tables of multipliers which would apply to a judgment given in November, 1986. These tables were produced using a small I.B.M. PC type computer and a readily available spreadsheet program. Each entry in the table represents the value in November, 1986 of $1.00 which became payable during the month to which the entry relates and which attracted interest, compounded monthly, at the prime rate (less ¼%), or at 3½% in the case of the table applicable to non-pecuniary loss. These two tables, labelled Table A (prime less ¼%) and Table B (3½%) may be found on the next two pages of this Report.

C. Use of the Tables

1. Introduction

The following discussion and examples will illustrate the manner in which the tables could be used in a number of cases. In each case, prejudgment interest is calculated in accordance with the recommendations set out in this Report.

TABLE A

ADJ. PRIME RATE MULTIPLIERS NOV. 1986

Rate Adj. > −0.25%	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1975	4.025	3.990	3.956	3.926	3.897	3.869	3.841	3.813	3.786	3.758	3.729	3.699
1976	3.670	3.642	3.613	3.585	3.555	3.526	3.496	3.468	3.439	3.410	3.382	3.354
1977	3.328	3.303	3.279	3.256	3.233	3.210	3.187	3.166	3.145	3.124	3.104	3.083
1978	3.063	3.042	3.022	3.002	2.981	2.959	2.937	2.915	2.893	2.871	2.847	2.822
1979	2.795	2.770	2.743	2.716	2.690	2.664	2.638	2.612	2.586	2.560	2.533	2.503
1980	2.472	2.442	2.413	2.383	2.351	2.319	2.294	2.269	2.247	2.224	2.202	2.179
1981	2.154	2.122	2.090	2.060	2.030	2.000	1.968	1.937	1.902	1.867	1.835	1.806
1982	1.780	1.755	1.732	1.709	1.685	1.662	1.639	1.615	1.592	1.572	1.553	1.535
1983	1.519	1.504	1.489	1.476	1.462	1.449	1.436	1.423	1.411	1.398	1.386	1.373
1984	1.361	1.349	1.337	1.325	1.313	1.301	1.288	1.275	1.261	1.247	1.234	1.222
1985	1.210	1.199	1.188	1.177	1.167	1.157	1.147	1.137	1.127	1.118	1.109	1.100
1986	1.091	1.082	1.072	1.061	1.051	1.041	1.032	1.024	1.016	1.008	1.000	
1987												
1988												
1989												

TABLE B

REAL RATE MULTIPLIERS NOV. 1986

Rate Adj. > 0.00%

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1975	1.512	1.508	1.503	1.499	1.495	1.490	1.486	1.482	1.477	1.473	1.469	1.465
1976	1.460	1.456	1.452	1.448	1.443	1.439	1.435	1.431	1.427	1.422	1.418	1.414
1977	1.140	1.406	1.402	1.398	1.394	1.390	1.386	1.382	1.378	1.374	1.370	1.366
1978	1.362	1.358	1.354	1.350	1.346	1.342	1.338	1.334	1.330	1.326	1.323	1.319
1979	1.315	1.311	1.307	1.303	1.300	1.296	1.292	1.288	1.285	1.281	1.277	1.273
1980	1.270	1.266	1.262	1.259	1.255	1.251	1.248	1.244	1.241	1.237	1.233	1.230
1981	1.266	1.233	1.219	1.215	1.212	1.208	1.205	1.201	1.198	1.194	1.191	1.187
1982	1.184	1.181	1.177	1.174	1.170	1.167	1.164	1.160	1.157	1.153	1.150	1.147
1983	1.143	1.140	1.137	1.133	1.130	1.127	1.124	1.120	1.117	1.114	1.111	1.107
1984	1.104	1.101	1.098	1.094	1.091	1.088	1.085	1.082	1.079	1.076	1.072	1.069
1985	1.066	1.063	1.060	1.057	1.054	1.051	1.048	1.045	1.042	1.039	1.036	1.033
1986	1.030	1.027	1.024	1.021	1.018	1.015	1.012	1.009	1.006	1.003	1.000	
1987												
1988												
1989												

2. Choosing the Appropriate Multiplier

Table A and Table B are prepared on a monthly basis. It would be possible to create tables accommodating shorter or longer periods. It was concluded, however, that any longer basis was not sufficiently responsive to changing economic circumstances and volatile interest rates, while shorter periods result in the continuing, and highly inconvenient, production of large numbers of tables.

The traditional method of calculating interest is more accurate than using multipliers in one respect. The tables cannot be used to distinguish between causes of action, or losses which arise on different dates within a month. All are allocated to a single month.

This may result in some minimal distortion of compensation, depending on the date loss occurs. For example, if loss is suffered January 1, 1986 and judgment was pronounced January 30, 1986, no prejudgment interest would be paid. On the other hand, if the loss was suffered December 31, 1985 and judgment was given January 2, 1986, interest would accrue as if the damage had been outstanding for the whole month.

This imprecision is a cost in adopting the multiplier scheme. We believe that the benefit of using multipliers to calculate compound judgment interest far outweighs this cost.

3. Some Examples

EXAMPLE 1: An Action in Debt/Money Had and Received

(a) Details of the Claim

Cause of Action Arose	January 1, 1981
Principal Sum	$100,000.00
Date of Judgment	November 15, 1986
Judgment for	$100,000.00

(b) Calculation of Quantum

Multiplier for January 1, 1981 (from Table A)	2.154
$100,000 × 2.154 =	$215,400.00
Judgment for Plaintiff including prejudgment interest	$215,400.00

EXAMPLE 2: A Simple Personal Injury Case

(a) Details of the Claim

Cause of Action Arose	December 24, 1984
Date of Judgment	November 26, 1986
Pain & Suffering, Loss of Amenities	$ 8,000.00
Past Wage Loss @ $2500/month	$ 5,000.00
Rehabilitation Equipment (Purchased Dec. 29/84 ($275) and March 13/85 ($225))	$ 500.00
Taxi Fares, Prescription Drugs, etc.:	
December 1984	$ 25.00
January 1985	$ 56.90
February 1985	$ 125.00
Future Lost Income	$ 1,000.00

(b) Calculations

Pain & Suffering (non-pecuniary loss; Table B)	
$8,000 × 1.069	$ 8,552.00

Past Wage Loss (Table A)	
January 1985: $2500 × 1.210	$ 3,025.00
February 1985: $2500 × 1.199	$ 2,997.50
Rehabilitative Equipment (Table A)	
December 1984: $275 × 1.222	$ 336.05
March 1985: $225 × 1.188	$ 267.30
Other Past Pecuniary Loss (Table A)	
December 1984: $ 25.00 × 1.222	$ 30.55
January 1985: $ 56.90 × 1.210	$ 68.85
February 1985: $125.00 × 1.199	$ 149.88
Future Lost Income $1000 × 1.00	
(no prejudgment interest payable)	$ 1,000.00
Total Judgment including Prejudgment Interest	$ 16,427.13

D. Post-Judgment Interest and the Multiplier Scheme

1. INTRODUCTION

Multipliers may equally be used to calculate post-judgment interest. Earlier we concluded that, in the absence of an "agreement about interest," all amounts ordered to be paid, inclusive of prejudgment interest should attract post-judgment interest. To determine the amount of post-judgment interest due and owing, and therefore the present value of the judgment, the amounts ordered to be paid would be treated as if they were a new cause of action arising within the month in which judgment is given. The appropriate multiplier may then be used to determine present value.

EXAMPLE:

Date of Judgment	January 15, 1978
Amount of Judgment	$ 5,600.00
Value in November 1986: $5600 × 3.063 (Table A)	$ 17,152.80

E. Contractual Interest and the Multiplier Scheme

Since the use of multipliers depends on a statutory rate of interest calculated in a consistent manner, the table of multipliers is obviously of limited use when judgment interest is to be calculated on a contractual basis. The Commission has recommended that the existence of a contract "about interest" or the existence of a statutory right to interest would preclude the application of the *Court Order Interest Act*. Reliance on the table of multipliers would be similarly excluded.

F. Availability of the Tables

Once a computer program has been prepared, generating a new table of multipliers is a relatively easy task, requiring no judicial input. At present, many judgments attract prejudgment interest fixed by the court at the rate set by the Registrar for default judgments. This rate is based on the rate paid on funds in court, itself derived from the prime rate charged by the Province's banker. There would appear to be no reason why the Registrar should not continue to be charged with the task of determining the appropriate rate of interest. His office could also be charged with the further task of preparing and issuing new tables of multipliers on a monthly basis.

The precise method of making such tables available to the public will depend in part on the Registrar's office practice. It is anticipated, however, that

such tables will be available as a matter of course at every court registry in the Province. Arrangements could also be made to permit law firms and others to obtain the appropriate tables by subscription. Such a service could be available from the Registrar's office, the Queen's Printer, or perhaps a private publishing firm.

G. Recommendations

The following recommendations indicate the manner in which a multiplier scheme might be embodied in a New Act.

The Commission recommends:

26. Judgment interest should be calculated with reference to two tables of multipliers issued by the Registrar of the Supreme Court. The multiplier indicated for each month in a table would indicate the value of $1.00, together with interest pursuant to the New Act to the month for which the table is released.

27. The tables should be prepared on the basis that the successful party is entitled to compound interest:

- *(a) on non-pecuniary loss at the rate of 3.5% per annum, compounded monthly, and*
- *(b) on past pecuniary loss at the prime rate charged by the banker referred to in Rule 58(5) of the Rules of Court, in force on the last day of the preceding month, appropriately adjusted to compensate for the effect of monthly compounding.*

28. The tables would be issued monthly, and would be conclusive as to the quantum *of a judgment, inclusive of judgment interest payable up to the month for which the table was issued.*

29. The quantum *of a judgment, inclusive of prejudgment interest would be determined in the following manner:*

- *(a) Determine whether prejudgment interest is payable on the sum in issue.*
- *(b) If it is, determine whether such interest runs from*
  - *(i) the date the cause of action arose,*
  - *(ii) the date the loss occurred, or*
  - *(iii) such other date as the court orders in accordance with the recommendations in this Report.*
- *(c) If the loss is non-pecuniary, locate the special table in force for that type of loss. If the loss is pecuniary, locate the table in general use in force at the date judgment was given.*
- *(d) Multiply the sum in issue by the multiplier indicated for the month from which prejudgment interest runs.*
- *(e) Add together the products of all such calculations, plus any sums which do not bear prejudgment interest.*

30. The amount outstanding on a judgment, inclusive of compound post-judgment interest, would be determined as follows:

- *(a) Locate the general table in force in respect of the month for which the determination is to be made.*
- *(b) Multiply the original amount of the judgment by the multiplier indicated in the table for the month in which judgment was given.*
- *(c) Multiply any unrealized execution costs by the multiplier indicated for the month in which they were incurred.*
- *(d) Add the products obtained by (b) and (c).*

31. Arrangements should be made to provide for a service whereby updated tables could be obtained by subscription on a timely basis.

CHAPTER XIV

THE MULTIPLIER SCHEME: DEALING WITH PART PAYMENTS

A. Introduction

The previous chapter illustrated the application of the multiplier scheme to the simplest and most straightforward of situations. All amounts to be calculated were due to the plaintiff although they arose in different ways. The examples did not raise facts which required that amounts be taken into account to the credit of the defendant. In practice such facts will arise frequently. For example, interim or part payments may have been made to the plaintiff.

This raises two questions. First, how are such credits currently dealt with under the *Court Order Interest Act* and is the position satisfactory? Second, how are they to be dealt with in the context of the multiplier scheme?

B. Interim Payments

1. Voluntary Payments

How are payments made by a defendant prior to judgment treated for prejudgment interest purposes? Interim payments may be made on an *ex gratia* basis. Where no serious dispute exists as to liability, payments may be made on account. When such payments are made, the plaintiff has not been kept out of all his money. Those payments must be accounted for when prejudgment interest is calculated.

Until the decision of the Court of Appeal in *Baart v. Kumar*,[1] it seemed well established that prejudgment interest was to be calculated on the declining principal balance of the judgment.[2] In effect, the interim payment is deducted from principal on the date of receipt. This practice is not sanctioned by the express wording of the *Court Order Interest Act*. Indeed, in *Gillis* v. *Bates* in which that result was first reached, Taylor J. expressed the view that the Act probably required the interim payments to be deducted from the principal sum in their entirety before the addition of prejudgment interest to the order.[3] In *Gillis* v. *Bates*, however, counsel conceded that prejudgment interest should be calculated on the declining principal balance, and Taylor J.'s order was based in large measure on an "inferred agreement" to that effect. Later cases applying *Gillis* v. *Bates* on this point make no reference to that concession.

Baart v. *Kumar*[4] offered the Court of Appeal an opportunity to clarify the position. The leading judgment suggested that recognizing interim payments on a declining balance principle was not open to the court given the language of the *Court Order Interest Act* and that the only flexibility the court possessed to produce an equitable result which reflected early receipt of the payment by the plaintiff was to modify the interest rate in some fashion. In

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[1] *Baart* v. *Kumar*, (1985) 66 B.C.L.R. 1 (B.C.C.A.).

[2] *Gillis* v. *Bates*, (1979) 100 D.L.R. (3d) 682, [1979] 5 W.W.R. 164, 12 B.C.L.R. 375 (B.C.S.C.); *Mattrick* v. *Rowna*, (1982) 40 B.C.L.R. 157 (B.C.S.C.); *Baart* v. *Kumar*, [1983] 4 W.W.R. 419 (B.C.S.C.); *Carlyle* v. *Elite Ins. Co.*, (1984) 56 B.C.L.R. 331, 341 (B.C.S.C.); *Nicholls* v. *Richmond*, (1985) 60 B.C.L.R. 320 (B.C.S.C.); *Fahie* v. *Ward*, (1983) 43 B.C.L.R. 291 (B.C.S.C.); *Nathoo* v. *Nathoo*, (1983) 52 B.C.L.R. 133 (B.C.S.C.); *A.N.I. Australia Pty.* v. *Hunnay*, [1981] Qd. R. 598. If the voluntary advance payment is not expressly pleaded, prejudgment interest will be calculated on the whole of the plaintiff's claim: *Hinskens* v. *Walker*, (1984) 58 B.C.L.R. 253 (B.C.S.C.); *cf. per contra Boulton* v. *Surina*, (1985) 65 B.C.L.R. 164, 12 C.C.L.T. 20 (B.C.S.C.).

[3] *Ibid.* at 685 (D.L.R.). A similar rule applies in Ontario: *see James* v. *Peter Hennon Ltd.*, (1981) 122 D.L.R. (3d) 734, 32 O.R. (2d) 480 (Ont. H.C.). In *Carter* v. *Junkin*, (1984) 11 D.L.R. (4th) 545 (Ont. H.C.), the court refused to approve payment into court to partially settle an infant's claim unless the defendant undertook to make up any lost prejudgment interest. In contrast, in *Myers* v. *Juillet*, (1984) 27 A.C.W.S. (2d) 477, prejudgment interest was held not to run until two weeks after the last interim payment.

[4] *Supra*, n. 1.

performing the actual calculations, however, a method of calculating interest was adopted which was indistinguishable in both result and theory from awarding interest on the declining balance. A modified interest rate did not appear to be used.

As a result, it is difficult to know precisely what, if any, change has been wrought by *Baart* v. *Kumar*. Nor is it clear how the method adopted in that case is to be reconciled with the provisions of the *Court Order Interest Act*.

2. No-fault Benefits

In this province, under our scheme of compulsory motor vehicle insurance, a variety of "no-fault" benefits are available to the victims of road accidents. The nature of, and entitlement to, these benefits are governed by the *Insurance (Motor Vehicle) Act*[5] and the regulations made under it.[6] These enactments provide that periodic payments are to be made to a person who is disabled from engaging in an employment or occupation,[7] or from acting as a homemaker.[8] These benefits are intended to replace lost income (or in the case of the homemaker, the lost ability to provide services to the family). They also cover medical and rehabilitative expenditures,[9] funeral expenses, and death benefits.[10] A single insurer, the Insurance Corporation of British Columbia, (I.C.B.C.) provides these benefits and has a statutory monopoly over auto insurance.

Two features of this scheme should be noted. First, the payments are often far short of a full indemnity for what the victim has lost. Benefit payments designed to replace lost income, for example, will generally be much lower than the income actually forgone. Second, the entitlement to receive these benefits does not depend on the victim being able to fix liability on some other person, but their receipt does not disentitle the victim to sue any person on whom blame can be fixed. This is frequently done both to recover damages in respect of losses for which there is no compensation under the no-fault scheme, and to gain a more generous measure of recovery for those losses that are compensated.

The possibility of such actions was a matter of concern to those who framed the statutory insurance scheme. It was thought wrong in principle that the victim might recover, say lost income, twice; first from I.C.B.C. as a no-fault benefit and second from the person at fault (and hence again from I.C.B.C. who would usually be that person's insurer).

The statutory response to this possibility was section 24 of the *Insurance (Motor Vehicle) Act*. The relevant subsections provide:

> **24.** (1) In this section and in section 25 "benefits" means a payment that is *or may be* made in respect of bodily injury or death under a plan established under this Act,. . . [emphasis added]
>
> (4) In an action in respect of bodily injury or death caused by a motor vehicle or trailer or its ownership, use or operation, the amount of benefits paid, or to which the claimant is or would have been entitled, shall not be referred to or disclosed to the court or jury until the court has assessed the award of damages and costs.
>
> (5) After assessing the award of damages and costs under subsection (4) shall be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court shall estimate it and take the estimate into account, and the person is entitled to enter judgment for the balance only.

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[5] R.S.B.C. 1979, c. 204.
[6] Regulation 447/83.
[7] *Ibid.* s. 80.
[8] *Ibid.* s. 84.
[9] *Ibid.* s. 88.
[10] *Ibid.* s. 92.

A preliminary point to note is that the section is drafted in such a way that not only must benefits which the victim actually received be taken into account under subsection (5), but those to which he was entitled but did not receive must also be taken into account. While victims should be encouraged to claim their no-fault benefits, this result seems extreme.

The way in which benefits are "taken into account" is by deducting them from the assessed award.[11] Should they be deducted before or after prejudgment interest is calculated and added to the award? This issue arose in *Aammerlaan* v. *Drummond*,[12] where the plaintiff had received some $6,375 in no-fault benefits. Spencer J. reluctantly held that the benefits should be deducted before calculating interest:[13]

> Section 1 [of the *Court Order Interest Act*] now reads:
>
> > 1(1) Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount *ordered to be paid*. . . (Italics added.).
>
> In my opinion, "the amount ordered to be paid" can only mean the net sum which a defendant must pay to a plaintiff after taking into account all proper discounts, including the payment of no-fault benefits. The "amount ordered to be paid" in s. 1 is in the "judgment of the balance only" referred to in s. 24(5) of the *Insurance (Motor Vehicle) Act*.
>
> Such a result, I venture to suggest, does not accord with the concept of fairness expressed by Taylor J. in *Gillis* v. *Bates*, *supra*, but it is in accordance with the wording of the two statutes in question. It leaves it open to the defendant to refrain from paying no-fault benefits until the eve of trial and then, by paying them, to wipe out the plaintiff's right to interest back to the date when the cause of action arose.[14] That is not the case here, for the benefits appear to have been paid at fair and reasonable intervals while the cause awaited trial. Were it otherwise, a trial Judge might temper any injustice by adjusting the rate of interest. I remark on that not to suggest that others should do it as much as to draw the attention of the legislators to the discrepancy between the result of the statutes as presently worded and the judgment in *Gillis v. Bates*.

The result of this decision is that, for the purposes of prejudgment interest, all no-fault benefits, whether received by the plaintiff or not, are to be treated as if they had been received on the day the cause of action arose. This is difficult to justify. The rationale behind section 24 would not be impaired if the courts were permitted to award prejudgment interest on the declining balance of the award, taking into account the date on which the money was actually received.

3. Conclusions

(a) Declining Balance Principle

It is our conclusion that, as a general rule, voluntary interim payments and no-fault benefits, whether or not received, should not be deducted from the whole of the judgment prior to calculating prejudgment interest.

To do so is not only a violation of fairness and common sense, but a rejection of reality. The justice of using a declining balance approach is so

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[11] Section 24.

[12] (1982) 132 D.L.R. (3d) 375, 26 C.P.C. 293, 14 A.C.W.S. (2d) 442, supplementary reasons given (1982) 136 D.L.R. (3d) 571 (B.C.S.C.).

[13] *Ibid.* at 376-377 (D.L.R.). To the same effect, *see Fahie* v. *Ward*, *supra*, n. 2; *Nathoo* v. *Nathoo*, *supra*, n. 2. *Mattrick* v. *Rawna*, *supra*, n. 2; *Baart* v. *Kumar*, *supra*, n. 2; *Shea* v. *Shea*, (1983) 47 B.C.L.R. 59, cf. *Maggio* v. *Spencer*, [1982] 1 I.L.R. 1-1504 (Ont. C.A.).

[14] The unfair consequences adumbrated by Spencer J. arose in *Harris* v. *I.C.B.C.*, (1983) 48 B.C.L.R. 270 (B.C.S.C.). The defendant Insurance Corporation of British Columbia had attempted to avoid an award of prejudgment interest on a judgment for, *inter alia* no-fault benefits by forwarding cheques to the plaintiff on the eve of trial. Proudfoot J. avoided the result suggested by Spencer J. by holding that the offer of payment was conditional and was not accepted.

obvious that it needs little comment. The only objection which might be taken to it is that calculations based on a declining balance might be thought to be complex. In fact, the adoption of the multiplier scheme has the potential to greatly simplify calculations where interim payments are involved. This will be discussed later in this chapter and a number of examples provided. Moreover, the fact that the compounding of prejudgment interest will be built into the multiplier scheme means that, functionally, interim payments will be allocated first to interest and second to principal in conformity with normal commercial practice.

The Commission recommends:

32. Under the New Act, an interim payment by the defendant should be accounted for on a declining balance principle, as described in recommendation 37.

Recommendation 37 and the text and examples which precede it describe and illustrate the operation of the declining balance principle in the context of the multiplier scheme.

(b) No-fault Benefits

The application of this general conclusion to no-fault benefits payable by the Insurance Corporation of British Columbia raises special issues. These are best analysed by dividing these benefits into three categories.

The first category is no-fault benefits relating to prejudgment losses to which the plaintiff is entitled, and which are actually received by him prior to judgment. The second category of no-fault benefits consists of payments which ought to have been made during the prejudgment period, but which, for one reason or another, were not. The combined effect of the *Court Order Interest Act* and section 24 of the *Insurance (Motor Vehicle) Act* is to require the deduction of the value of both categories of benefits from the judgment prior to the calculation of prejudgment interest. The third category of no-fault benefits is benefits payable with respect to the post-judgment period.

(i) Benefits Actually Received

The application of the declining balance principle to the first category is most straightforward. The amount of the no-fault benefit should simply be credited against principal and interest accrued to the date of payment as if it were an interim payment.

The Commission recommends:

33. A no-fault benefit actually received by the plaintiff in respect of a past pecuniary loss should be accounted for under recommendation 32 as if it were an interim payment.

(ii) Benefits not Received

The second category of no-fault benefits, those which ought to have been received during the prejudgment period but were not, call for special treatment. While the legislation may mandate the deduction of such benefits whether received or not, simple fairness requires that this deduction should not be made in a way which prejudices a claimant's right to prejudgment interest. No-fault benefits falling within this category should be deducted from the total amount of the judgment *after* the calculation of prejudgment interest.

The Commission recommends:

34. If a no-fault benefit was payable to the plaintiff by I.C.B.C., in respect of the period prior to judgment, but was not received by him prior to judgment, the value of the benefit should be deducted from the judgment only after prejudgment interest has been added to it.

(iii) Benefits Relating to Future Loss

The third category of no-fault benefits — no-fault benefits relating to the post-judgment period — raises a different issue. The deduction of these benefits is also required by section 24 of the *Insurance Motor Vehicle Act*. The kind of loss identified with such a payment is one for future pecuniary loss and no prejudgment interest is currently payable in respect of such a loss by reason of section 2(a) of the *Court Order Interest Act*. Provided that the no-fault benefit in this category is deducted from the portion of the judgment intended to compensate for future pecuniary loss, the payment of such a benefit would appear to have no prejudgment interest implications. The difficulty lies in the fact that the provision which calls for the deduction does not clearly distinguish between the various aspects of the plaintiff's claim.

A question arises where the amount of the no-fault benefit exceeds the portion of the plaintiff's award for future pecuniary loss. How is the excess to be dealt with? This issue arose in *Choboter* v. *Reimer*[15] where Southin J. considered the allocation of $6000.00, representing the cost of future care, to a judgment obtained by a plaintiff. The plaintiff's loss in that regard had been assessed at $6000.00, but was reduced to $3000.00 by reason of the plaintiff's contributory negligence. Southin J. held that the $3,000 surplus, representing benefits payable regardless of fault, was only to be allocated to future loss. The surplus could not be used to reduce the plaintiff's judgment under other heads of loss; each head was to be regarded as a separate claim.

In our view Southin J. is correct. It is wrong in principle to allocate future benefits to anything other than future pecuniary loss. If that is done, then the calculation of prejudgment interest will not be affected, since future loss will not attract prejudgment interest.

The Commission recommends:

35. The value of a no-fault benefit payable to a plaintiff by I.C.B.C. in respect of the post-judgment period should be applied only against damages for future pecuniary loss.

Recommendations 33 to 35 are all aimed at altering a legal position that arises out of the combined effect of the *Court Order Interest Act* and the *Insurance (Motor Vehicle) Act*. No doubt much can be achieved through changes to the former Act and the development of the "New Act" recommended in this Report. We do not overlook, however, the possibility that amendments to the latter Act may also be desirable to attain the appropriate legislative distribution. This is a matter we are content to leave to Legislative Counsel and have no recommendations on the precise way these recommendations should be implemented.

(c) Appropriation

There is a final issue. When a voluntary interim payment is made, how should it be appropriated where the payer has not identified it with any particular aspect of the plaintiff's loss? This question was considered by Lambert J.A. in *Baart* v. *Kumar*:[16]

[15] (1985) 65 B.C.L.R. 208 (B.C.S.C.).
[16] *Supra*, n. 1 at 34-35.

> Two questions remain. The first is whether in calculating the interest rate, the interim payment should be treated as having been applied first on the part of the damage award that attracts court order interest or whether they should be treated as having been applied first on the part that does not, namely pecuniary loss arising after judgment. . . .
>
> In my opinion, the best answer to the first question is to treat the payments as having been applied wholly on the part of the damage award that attracts court order interest, and not until that part is extinguished by the payments should any amount be treated as having been applied on the part of the damage award that does not attract court order interest. Interim payments are almost always voluntary. . . they are not intended to be prepayment of compensation for pecuniary loss that will arise in the future. They are intended to alleviate the distress caused by the delay in establishing final compensation for the outlays that have already been incurred and for the damages that have already been suffered. So they should be treated as having been applied against the compensation eventually awarded in the judgment for these outlays and damages.

We agree with the reasoning of Lambert J.A. and would favour a statutory rule which appropriates voluntary interim payments to the interest bearing portion of the award and specifically to that portion representing past pecuniary loss. This will encourage the making of such payments.

The Commission recommends:

36. A voluntary interim payment should be applied first to that portion of the award representing past pecuniary loss, second to that portion representing non-pecuniary loss, and lastly to damages for future pecuniary loss unless the person making the payment has stipulated a different appropriation.

C. Interim Payments and the Multiplier Scheme

1. The Procedure

The multiplier system can easily account for interim payments made before judgment. The way this is done is to multiply each payment by the multiplier in effect for the month in which it was received, as determined by the table in effect for the month in which the judgment is given. The result would then be subtracted from the amount of the judgment, initially calculated without reference to the interim payment. This would excise from the judgment all sums attributable to the payment, and interest which would notionally accrue on it after the date it was received. This is exactly what is achieved by the declining balance approach.

This procedure is most easily envisaged if the interim payment is thought of as a cross-claim which arises in favour of the defendant at the time the payment is made. This notional cross-claim then attracts prejudgment interest in the same fashion as the plaintiff's claim and is set off against it when accounts are balanced at trial.

2. The Examples

The examples which follow use Tables A and B that were set out in the previous chapter.

EXAMPLE 1: An Action for Work and Material Supplied, Counterclaim for Cost of Completing Work

(a) Details of the Claim

Cause of Action Arose	March 12, 1981
Counterclaim Arose	April 3, 1982
Date of Judgment	November 12, 1986

Amount due to Plaintiff	$ 25,162.98
Amount due to Defendant on Counterclaim	$ 3,692.18
(b) Calculations	
Multiplier for March, 1981) (from Table A)	2.090
Multiplier for April, 1982) (from Table A)	1.709
Credit Plaintiff: $25,162.98 × 2.090	$ 52,590.63
Credit Defendant: $3,692.18 × 1.709	$ 6,309.94
Judgment for plaintiff including prejudgment interest	$ 46,280.69

EXAMPLE 2: A Wrongful Dismissal Action

(a) Details of the Claim	
Cause of Action Arose	February 1, 1984
Date of Judgment	November 19, 1986
Credit to Plaintiff	
Damages for Past pecuniary Loss: ($2000/month, from Feb. 1/84 to June 30/84)	$ 10,000.00
Damages for Mental Distress	$ 2,000.00
Credit to Defendant	
Interim Payment (June 15, 1985)	$ 4,500.00
(b) Calculations	
(1) Credit to Plaintiff	
(i) Past pecuniary Loss (Table A)	
Feb. 1984: $2000 × 1.349	$ 2,698.00
March 1984: $2000 × 1.337	$ 2,674.00
April 1984: $2000 × 1.325	$ 2,650.00
May 1984: $2000 × 1.313	$ 2,626.00
June 1984: $2000 × 1.301	$ 2,602.00
	$ 13,250.00
(ii) Damages for Mental Distress (Non-pecuniary loss; Table B) Feb 1984: $2000 × 1.101	$ 2,202.00
Total Credit to Plaintiff	$ 15,452.00
(2) Credit to Defendant (From Table A) June 1985: $4500 × 1.157	$ 5,206.50
(3) Judgment for Plaintiff for difference	$ 15,452.00
	-$ 5,206.50
Total judgment including prejudgment interest	$ 10,245.50

EXAMPLE 3: A Claim for Interest Only Following the Acceptance of a Tender of the Principal Amount of a Debt after an Action has been Commenced.

Note: See recommendation No. 18 and the text preceding it respecting the plaintiff's rights to interest in these circumstances.

(a) Details of the Claim	
Amount of Debt	$ 15,000.00
Debt to Plaintiff became Payable	May 15, 1981
Plaintiff Commenced Action	January 20, 1986
$15,000 is tendered to, and accepted by the Plaintiff	March 10, 1986
Date of Judgment	November 21, 1986

(b) Calculations

(1) Credit to Plaintiff (Table A; May 1981) $15,000 × 2.030	$ 30,450.00
(2) Credit to Defendant (Table A; March 1986) $15,000 × 1.072	$ 16,080.00
Judgment for Plaintiff	$ 14,370.00

EXAMPLE 4: A Complicated Personal Injury Case

This example has been relegated to Appendix E in order that the calculations may be set out in detail.

3. RECOMMENDATION

Our recommendation respecting the treatment of interim payments within the multiplier scheme is, essentially, to add an additional step to the procedure described in recommendation 29.

The Commission recommends:

37. Where one or more interim payments have been received by the plaintiff, the quantum of a judgment determined under recommendation 29 should be reduced for each interim payment by the product of the amount of the payment and the multiplier for the month in which it was received.

D. Part Payment on a Judgment

1. CREDIT FOR PART PAYMENT

Accounting for payments made on a judgment parallels the process adopted for prejudgment payments.[17] To determine the outstanding portion of the judgment, its notional value at the relevant date would be determined by using the multiplier from the table in force indicated for the month in which judgment is given. In order to excise payments on account and the interest which nominally accrued on such interim payments after the date of payment, the multiplier in force for the month in which payment was received indicated by that table would be used. The product would then be subtracted from the original judgment as increased by post-judgment interest.

Below are examples of the manner in which the tables could be used to calculate the amount due and owing on a judgment where a payment on account had been made.

2. EXAMPLES

EXAMPLE 1: One Payment on Account

Date of Judgment	July 26, 1981
Amount of Judgment	$ 65,736.22
Date of Payment	January 7, 1985
Amount of Payment	$ 25,000.00
Date for which outstanding amount is to be calculated	November 12, 1986
Calculations:	
(1) Credit to Plaintiff Present value of judgment $65,736.22 × 1.968 (Table A)	$129,368.88

[17] We use the term "payment" here to include any money obtained in partial satisfaction of a judgment. This may include money realized on execution.

(2) Credit to Defendant	
Present value of payment:	
$25,000.00 × 1.210 (Table A)	$ 30,250.00
Amount of Judgment Outstanding Including Interest	$ 99,118.88

EXAMPLE 2: Judgment with Execution Proceedings

Date of Judgment	February 16, 1980
Amount of Judgment	$1,764,223.00
Feb. 28, 1982: Payment on account received	$ 500,000.00
May 7, 1983: Costs of abortive execution procedure incurred	$ 350.00
Aug. 6, 1984: Proceeds of execution are received	$ 317,000.00
Jan. 27, 1985: Proceeds of a further execution are received	$ 177,500.00
Date for which outstanding amount is to be calculated	November 19, 1986
Calculations (Table A)	
(1) Credit to Plaintiff	
Present value of judgment:	
$1,764,223.00 × 2.442	$4,308,232.50
Execution Costs: Present Value	
$350 × 1.462	$ 511.70
Total Credits to Plaintiff	$4,308,744.20
(2) Credits to Defendant	
Present value of payment:	
February 1982—$500,000 × 1.755	$ 877,500.00
Present value of Execution Proceeds:	
August 1984—$317,000 × 1.275	$ 404,175.00
Present value of Execution Proceeds:	
January 1985—$177,500 × 1.210	$ 214,775.00
Total Credits to Defendant	$1,496,450.00
Amount of Judgment Outstanding Including Interest	$2,812,294.20

3. RECOMMENDATION

Our recommendation here is a post-judgment analogue to our previous recommendation.

The Commission recommends:

38. Where money has been received in partial satisfaction of a judgment, to determine the amount outstanding on it, the amount calculated under recommendation 30 should be reduced by the product of the amount received and the multiplier for the month in which it was received.

CHAPTER XV APPLICATION AND TRANSITION

A. Introduction

A deliberate change in the law usually raises questions concerning the application of the changed law to facts and circumstances in existence at the time of the change. These questions are usually described as "transition issues," and when they arise competing policies must be reconciled.

One important policy is that legitimate expectations or rights acquired in reliance on the old law should not be lightly disturbed.[1] It is this policy that underlies the presumption of statutory interpretation against the retrospective operation of statutes.[2] If the transition issues are resolved in a way which gives great weight to this policy, it means that the old law remains in existence, to govern pre-existing rights, until all such rights have disappeared. The changed law would govern only rights arising after the change.

A competing policy is based on a view that it is undesirable that two bodies of law, each concerning the same subject matter but which dictate different results, should be allowed to co-exist for any length of time. A related view is that persons should not be deprived of the benefit of a changed law where this reflects a genuine improvement in it. Transition measures which reflect these policies would have the new law apply to rights and things already in existence.

The weight to be given particular policies in formulating transition measures is not a matter on which abstract decisions are possible. The appropriate balance requires that account be taken of many factors peculiar to the legislation and the rights and obligations involved.

B. Our General Conclusion

The Law Reform Commission's 1973 *Report on Prejudgment Interest* made the following recommendation concerning transition:[3]

> The [prejudgment interest] legislation should apply only in respect of causes of action arising after the coming into force of that legislation.

That recommendation was adopted in the implementing legislation.[4]

The Commission's 1973 recommendation gave great weight to the first of the policies mentioned above. To move from a regime where, for all practical purposes, there was no right to prejudgment interest to the scheme recommended was a large step. Caution seemed advisable not only as a matter of fairness to litigants but to avoid a transition measure that might imperil the adoption of the main recommendation.

While the policy of fairness to litigants is still most important, a move from the existing law to the regime we recommend in this Report is not, in substance, a large one. We believe, therefore, that a more robust approach to transition is possible.

A factor which is particularly relevant to this conclusion goes to the question of things done in reliance on the existing law. We have no reason to believe that, in general, decisions are taken or courses of conduct are adopted in reliance on particular features or nuances of the current law respecting prejudgment interest. The availability of prejudgment interest, as a more general concept, may play its role but reliance will seldom proceed beyond

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[1] *See Interpretation Act*, R.S.B.C. 1979, c. 206, s. 35(c).
[2] *See, e.g.*, Driedger, *Construction of Statutes*, 2d ed. (1983), 185.
[3] Law Reform Commission of British Columbia, *Report on Pre-Judgment Interest* (LRC 12, 1973), 27.
[4] *Prejudgment Interest Act*, S.B.C. 1974, c. 65, s. 6.

that. It is difficult to see how it could occur, given the discretion in the Act as to interest rates and the frequently uneven way it is exercised. We are satisfied that seldom, if ever, will circumstances arise in which prejudgment interest awarded in conformity with our recommendations will not satisfy legitimate expectations based on the current law.

Given this conclusion, it is difficult to justify maintaining two co-existing regimes of prejudgment interest. It is equally difficult to justify depriving litigants of the convenience of the multiplier scheme for calculating interest and of the sophisticated financial assumptions on which the multipliers are based.

Our point of departure will be that the general rule for transition should provide that the New Act applies to all causes of action and proceedings, irrespective of when they arose or were commenced. As with many general rules, some exceptions may be necessary. We will, therefore, be testing the rule against specific recommendations which may raise special concerns in this context. If a departure from the general rule is called for an appropriate recommendation will be made. Finally, so far as existing judgments are concerned, transition to a new scheme of post-judgment interest raises special issues. These are also considered below.

The Commission recommends:

39.(1) So far as the New Act provides for prejudgment interest, it should apply to all claims that have not yet become merged in a pecuniary judgment on the day the Act comes into force.

(2) Paragraph (1) is subject to recommendations 40, 41 and 43.

(3) In the recommendations referred to in paragraph (2) the term "implementation date" means the day the New Act, so far as it provides for prejudgment interest, comes into force.

We would place one qualification on this recommendation. The New Act should not be brought into force until some period has elapsed from the time the Act received Royal Assent.

The purpose of this delay will be to give interested persons time to prepare. Those involved with the administration of justice — the Registrar and the Sheriff — will need to assess the impact of the New Act and the demands it will make on them. Time will be required so the legal profession can become thoroughly familiar with the use of the multiplier scheme.

The Commission recommends:

40. The implementation date should occur 6 months after the enactment of the New Act.

C. Special Transition Issues

1. Tender Before Judgment

In Chapter XI it was noted that prejudgment interest becomes payable on a debt only where there is a judgment. Payment in full by the defendant before judgment, even on the eve of trial, deprives the plaintiff of his claim for interest. Under recommendation 18(1), once the plaintiff has commenced an action, he would retain his right to claim prejudgment interest from the time the cause of action arose, notwithstanding later payment in full of the principal.

We have reservations about the application of this recommendation to all claims. If it applies to litigation in progress at the time the New Act comes into

force the defendant will have been deprived of the opportunity to make a tender before action and thus to avoid liability for interest. On balance, we think it should apply only where an action is commenced after the implementation date:

The Commission recommends:

41. Recommendation 18 should apply only where the action was commenced after the implementation date.

2. PAYMENTS INTO COURT

Section 4 of the *Court Order Interest Act* is designed to provide a sanction where a payment into court is unreasonably rejected by the plaintiff. The sanction is to deprive the plaintiff of a portion of prejudgment interest. Section 4, however, works imperfectly and recommendation 19 was designed to improve its operation.

A result of the current operation of section 4 is that a defendant must pay into court a somewhat higher amount than would be the case under recommendation 19. If the New Act applies to litigation in progress, are any special rules necessary to deal with payments made into court before the implementation date?

On balance, we believe that a special transition rule in this context would be too great a refinement. Such a rule should not preserve the current law for a prior payment into court. The current law is unfair to the defendant and he would not benefit from its preservation. The defendant would probably wish to see some mechanism that would permit a partial rebate of the money paid into court. That, however, would be a response wholly out of proportion to the problem.[5] We therefore make no recommendation.

3. INTEREST ON "FUNDS"

In recommendation 20 it was proposed that the definition of "funds" in the Rules of Court be amended to include the proceeds of a garnishment. If this were done interest would be payable by government on those proceeds. In our *Report on Settlement Offers*[6] an analogous recommendation was made with respect to payments made into court under Rule 37. In that Report we stated:[7]

> Legislation implementing [the] Recommendation. . . should only be introduced after consultation with the Ministry of Finance with respect to administrative questions that must be dealt with. The necessary administrative changes would probably best be implemented at the beginning of the fiscal year.

Those observations apply with equal force in this context.

The Commission recommends:

42. The timing of the implementation of Recommendation 20 should be the subject of consultation with the Ministry of Finance.

4. "PECUNIARY JUDGMENT"

Recommendation 15(2) would permit an award of prejudgment interest on a declaration - something not authorized by the current Act. As we pointed out in Chapter XI the presence or absence of a right to prejudgment interest can have major impact on the way in which a lawsuit is conducted. It may influence decisions respecting the vigor of the defense or, indeed, whether the suit is to be defended at all.

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[5] In any event Rule 37(3) of the Rules of Court might permit an application for such a rebate.
[6] LRC 77, 1984.
[7] *Ibid.* at 33.

Once those decisions have been taken they should not be undermined by changes in the law which alter the basis on which they were made. A declaration sought in litigation that had been commenced before the implementation date should not attract prejudgment interest.

The Commission recommends:

43. Recommendation 15(2), so far as it includes declarations, should apply only where the proceeding was commenced after the implementation date.

D. Post-judgment Interest

1. Coming into Force

Transition with respect to post-judgment interest raises special issues. One difficulty lies in the fact that the timing of change from the current law to that recommended in this Report (assuming prompt implementation by the province) lies with the Parliament of Canada. Parliament must first withdraw from this area of law.

As pointed out in Chapter XII, the *Court Order Interest Act* was amended in 1982 to provide for post-judgment interest,[8] but those amendments have not yet come into force. The legislation provided these amendments would become effective "on the date sections 12 to 15 of the *Interest Act* (Canada) cease to have effect in British Columbia." This, we believe, is a very useful formulation and one that might be employed with respect to our own recommendations.[9]

The Commission recommends:

44. So far as the New Act provides for post-judgment interest, it should become effective on the date sections 12 to 15 of the Interest Act *(Canada) cease to have effect in British Columbia.*

2. Existing Judgments

The application of our recommendations respecting post-judgment interest, to judgments in existence on the "federal withdrawal date" calls for comment. In our view the fairest approach is to treat each outstanding judgment as being capitalized on that date. The amount then due would, for the purposes of the multiplier scheme, be treated as a judgment that had been entered on that date.

The Commission recommends:

45. For the purposes of the multiplier scheme, a judgment in existence on the date referred to in recommendation 44 should be treated as a judgment given on that date for the amount then due.

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[8] S.B.C. 1982, c. 47.

[9] If the federal legislation should cease to have effect before the New Act is in place (thus triggering the 1982 amendments *ibid.*) a somewhat different measure will be required.

CHAPTER XVI CONCLUSION

A. Generally

This Report recommends a number of changes to the law respecting interest on judgments. Some are merely housekeeping. Others, such as our recommendations respecting the fixing of interest rates, compounding, and the use of tables of multipliers to calculate judgment interest would result in significant changes to British Columbia law and practice.

With the *Prejudgment Interest Act* in 1974, British Columbia became the first Canadian jurisdiction to enact modern legislation on this topic. Our pioneering efforts eased the way for other provinces and modern prejudgment interest legislation has become the norm. One published review of our Working Paper referred to:[1]

> . . . proposals which would not only revolutionize the treatment of interest by the courts in British Columbia but provide a model which law reformers in other commonwealth jurisdictions, where reform in this area has been incomplete or untried ought to contemplate very seriously.

British Columbia again has an opportunity to provide leadership in this sphere.

B. List of Recommendations

1.(1) The Court Order Interest Act *should be repealed and replaced by legislation (hereafter referred to as "the New Act") which embodies the recommendations made in this Report.*

(2) Subject to those recommendations, the New Act should carry forward the policies of the Court Order Interest Act. *(Page 12)*

2. The New Act should not confer upon courts a general discretion to withhold prejudgment interest from a litigant otherwise entitled to it. (Page 22)

3.(1) Under the New Act courts should have a discretion to fix a rate of interest only in cases in which foreign interest rates are in issue.

(2) In all other cases, courts should be obliged to award prejudgment interest at a statutory rate or rates determined in accordance with the New Act. (Page 26)

4.(1) The rate of prejudgment interest should be based on the prime lending rate charged on loans to its most creditworthy borrowers by the banker referred to in Rule 58(5) of the Rules of Court.

(2) The rate of prejudgment interest should be determined monthly. (Page 31)

5.(1) The prohibition on awarding "interest on interest" should not be carried forward into the New Act.

(2) Under the New Act, prejudgment interest should be compounded. (Page 32)

6.(1) The New Act should carry forward the general principle that prejudgment interest runs from the date the cause of action arose.

(2) The court should not be bound to award prejudgment interest from the date the cause of action arose where the whole or part of an unliquidated claim for pecuniary loss is assessed with reference to a later date.

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[1] Bowles and Whelan, "The Law of Interest, The Dawn of a New Era," (1986) 64 Can. B. Rev. 142.

(3) In the circumstances described in paragraph (2), the court should have a discretion to set a date from which prejudgment interest runs. (Page 36)

7.(1) The New Act should require that all awards for pecuniary loss be apportioned into past and future components, including:

(a) expenses incurred or to be incurred;

(b) damages for wrongful dismissal;

(c) damages for lost support or the value of a dependency in fatal accident cases;

(d) damages for lost income or for lost earning capacity.

(2) Prejudgment interest should be awarded only on the past component of an award. The future component of the award should not attract prejudgment interest. (Pages 49-50)

8. The New Act should carry forward the principle that the whole of an award of damages for non-pecuniary loss should attract interest throughout the period preceding judgment. (Page 51)

9.(1) The New Act should not carry forward the term "special damages" to describe pecuniary loss arising before judgment.

(2) The term "past pecuniary loss" should be adopted for this purpose. (Page 54)

10. Prejudgment interest should be payable on past pecuniary loss from the end of the month to which it relates. (Page 55)

11. The New Act should provide that in a trial by judge sitting with a jury the calculation of prejudgment interest be governed by the following rules:

(a) the calculation of prejudgment interest is a matter for the trial judge;

(b) the judge may make all findings of fact necessary to the calculation of interest;

(c) the judge has a discretion to ask the jury to make findings of fact which might assist in the calculation of prejudgment interest. (Pages 58-59)

12.(1) The New Act should provide that where, having regard to all the circumstances of the case, it is not possible

(a) to apportion a person's pecuniary loss between that arising before judgment and that arising after judgment; or

(b) to allocate the portion of a person's pecuniary loss arising before judgment to specific one month periods;

then the court may apply either or both of the following presumptions:

(c) the person's pecuniary loss is equally divided between that arising before judgment and that arising after judgment; and

(d) the person's pecuniary loss arising before judgment is allocated equally among all the months of the period between the time the cause of action arose and the judgment.

(2) The presumptions in paragraph (1) may be applied to any part of a person's pecuniary loss. (Page 59)

13. The New Act should provide that where, having regard to all the circumstances of the case,

(a) the apportionment of pecuniary loss into prejudgment and post-judgment components under recommendation 7, or

(b) *the allocation of prejudgment loss to particular one month periods under recommendation 10,*

and reliance on the presumptions set out in recommendation 12 would result in an injustice or an absurdity, then the court may assess the loss as a global amount with prejudgment interest running from a date to be selected in the discretion of the court. (Page 60)

14. Prejudgment interest payable on damages for non-pecuniary loss should be at the rate set by the Chief Justice under section 51(2)(b) of the Law and Equity Act. *(Page 64)*

15.(1) The New Act should continue to apply to "pecuniary judgments."

(2) "Pecuniary judgment" should be defined as including an order for the payment of money or that money is owing.

(3) No prejudgment interest should be payable:

(a) if there is an agreement about interest between the parties;

(b) if a creditor has waived in writing his right to interest;

(c) if an enactment otherwise provides for the payment of interest;

(d) on an order for costs except to the extent that they consist of disbursements. (Pages 68-69)

16. The Legal Profession Act *be amended to provide that a registrar's certificate given under Part 10 is a pecuniary judgment for the purposes of the New [Court Order Interest] Act. (Page 69)*

17.(1) In the New Act, "court" should be defined to include the Court of Appeal, Supreme Court, County Court, or Provincial Court.

(2) The definition of "pecuniary judgment" should include an order allowing or dismissing an appeal, and an order varying an order given at trial, to the extent that the order involves the payment of money. (Page 73)

18.(1) Under the New Act, a court should be obliged to order the payment of prejudgment interest on a debt:

(a) in respect of which an action has been commenced, and

(b) which is paid in full after the action was commenced,

from the date the obligation to pay arose to the date of payment, unless the parties otherwise agree.

(2) Paragraph (1) should not apply if payment is received as a result of the acceptance of a payment into court made pursuant to a defence of tender before action. (Page 77)

19.(1) The policy of section 4 of the Court Order Interest Act *should be carried forward in a provision of the New Act.*

(2) For the purposes of that provision, in determining whether the plaintiff has recovered a judgment greater than the amount paid into court under Rule 37 of the Rules of Court, the court should not take into account prejudgment interest accruing after the date of payment into court. (Page 81)

20. The definition of "funds" in Rule 58(1) of the Rules of Court be amended so as not to exclude money paid into court pursuant to a garnishing order. (Page 83)

21. Post-judgment interest should be levied at the same rate, and compounded in the same manner, as prejudgment interest. (Page 87)

22.(1) *The power of British Columbia courts to make* Larocque *orders should be preserved. The New Act should provide, therefore, that nothing in it prevents a court from awarding damages, in whatever manner it sees fit, which compensate a plaintiff for delay in payment of a capital sum whose value has been discounted in accordance with actuarial practice.*

(2) *When such damages are awarded, no post-judgment interest should be payable on the portion of the judgment in respect of which such damages are assessed. (Page 87)*

23. *Where a judgment is stated in a foreign currency, or its Canadian equivalent at the date of payment, the court should have a discretion to fix an appropriate rate or rates of post-judgment interest. (Page 87)*

24.(1) *If there is an agreement concerning interest after judgment, that agreement should govern the entitlement of the parties to post-judgment interest rather than the New Act.*

(2) *For the purposes of paragraph (1), an agreement concerning interest after judgment includes an agreement containing provisions respecting interest that are stipulated to apply after default. (Page 89)*

25. *Interest under the New Act should be deemed to be included in the judgment for enforcement purposes. (Page 89)*

26. *Judgment interest should be calculated with reference to two tables of multipliers issued by the Registrar of the Supreme Court. The multiplier indicated for each month in a table would indicate the value of $1.00, together with interest pursuant to the New Act to the month for which the table is released. (Page 96)*

27. *The tables should be prepared on the basis that the successful party is entitled to compound interest:*

(a) *on non-pecuniary loss at the rate of 3.5% per annum, compounded monthly, and*

(b) *on past pecuniary loss at the prime rate charged by the banker referred to in Rule 58(5) of the Rules of Court, in force on the last day of the preceding month, appropriately adjusted to compensate for the effect of monthly compounding. (Page 96)*

28. *The tables would be issued monthly, and would be conclusive as to the* quantum *of a judgment, inclusive of judgment interest payable up to the month for which the table was issued. (Page 96)*

29. *The* quantum *of a judgment, inclusive of prejudgment interest would be determined in the following manner:*

(a) *Determine whether prejudgment interest is payable on the sum in issue.*

(b) *If it is, determine whether such interest runs from*

(i) *the date the cause of action arose,*

(ii) *the date the loss occurred, or*

(iii) *such other date as the court orders in accordance with the recommendations in this Report.*

(c) If the loss is non-pecuniary, locate the special table in force for that type of loss. If the loss is pecuniary, locate the table in general use in force at the date judgment was given.

(d) Multiply the sum in issue by the multiplier indicated for the month from which prejudgment interest runs.

(e) Add together the products of all such calculations, plus any sums which do not bear prejudgment interest. (Page 96)

30. The amount outstanding on a judgment, inclusive of compound post-judgment interest, would be determined as follows:

(a) Locate the general table in force in respect of the month for which the determination is to be made.

(b) Multiply the original amount of the judgment by the multiplier indicated in the table for the month in which judgment was given.

(c) Multiply any unrealized execution costs by the multiplier indicated for the month in which they were incurred.

(d) Add the products obtained by (b) and (c). (Page 96)

31. Arrangements should be made to provide for a service whereby updated tables could be obtained by subscription on a timely basis. (Page 96)

32. Under the New Act, an interim payment by the defendant should be accounted for on a declining balance principle, as described in recommendation 37. (Page 100)

33. A no-fault benefit actually received by the plaintiff in respect of a past pecuniary loss should be accounted for under recommendation 32 as if it were an interim payment. (Page 100)

34. If a no-fault benefit was payable to the plaintiff by I.C.B.C., in respect of the period prior to judgment, but was not received by him prior to judgment, the value of the benefit should be deducted from the judgment only after prejudgment interest has been added to it. (Page 101)

35. The value of a no-fault benefit payable to a plaintiff by I.C.B.C. in respect of the post-judgment period should be applied only against damages for future pecuniary loss. (Page 101)

36. A voluntary interim payment should be applied first to that portion of the award representing past pecuniary loss, second to that portion representing non-pecuniary loss, and lastly to damages for future pecuniary loss unless the person making the payment has stipulated a different appropriation. (Page 102)

37. Where one or more interim payments have been received by the plaintiff, the quantum of a judgment determined under recommendation 29 should be reduced for each interim payment by the product of the amount of the payment and the multiplier for the month in which it was received. (Page 104)

38. Where money has been received in partial satisfaction of a judgment, to determine the amount outstanding on it, the amount calculated under recommendation 30 should be reduced by the product of the amount received and the multiplier for the month in which it was received. (Page 105)

39.(1) So far as the New Act provides for prejudgment interest, it should apply to all claims that have not yet become merged in a pecuniary judgment on the day the Act comes into force.

(2) Paragraph (1) is subject to recommendations 40, 41 and 43.

(3) In the recommendations referred to in paragraph (2) the term "implementation date" means the day the New Act, so far as it provides for prejudgment interest, comes into force. (Page 107)

40. The implementation date should occur 6 months after the enactment of the New Act. (Page 107)

41. Recommendation 18 should apply only where the action was commenced after the implementation date. (Page 108)

42. The timing of the implementation of Recommendation 20 should be the subject of consultation with the Ministry of Finance. (Page 108)

43. Recommendation 15(2), so far as it includes declarations, should apply only where the proceeding was commenced after the implementation date. (Page 109)

44. So far as the New Act provides for post-judgment interest, it should become effective on the date sections 12 to 15 of the Interest Act *(Canada) cease to have effect in British Columbia. (Page 109)*

45. For the purposes of the multiplier scheme, a judgment in existence on the date referred to in recommendation 44 should be treated as a judgment given on that date for the amount then due. (Page 109)

C. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper which preceded this Report. The size and complexity of the Working Paper made this a significant task. In addition, we would like to acknowledge the contribution of a former Commissioner, the Honourable Mr. Justice Ronald I. Cheffins, who participated in settling the terms of the Working Paper.

Finally, we wish to express our thanks to Mr. Frederick W. Hansford, a former Commission staff lawyer. He carried the burden of research on this project, and, subject to direction from the Commission, prepared the Working Paper.

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January 26, 1987

APPENDICES

Appendix A

COURT ORDER INTEREST ACT

CHAPTER 76

[Act administered by the Ministry of Attorney General]

Court order interest

1. (1) Subject to section 2, a court shall add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances, but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada), from the date on which the cause of action arose to the date of the order.

(2) Notwithstanding subsection (1), where the order consists in whole or part of special damages, the interest on those damages shall be calculated

(a) on the total of the special damages incurred in the 6 month period immediately following the date on which the cause of action arose; and

(b) on the total of the special damages incurred in any subsequent 6 month period, from the end of each 6 month period in which the special damages were incurred to the date of the order

(3) For the purpose of calculating interest under subsection (2), and notwithstanding subsection (2), where the date of the order occurs

(a) before a date 8 months after the date on which the cause of action arose; or

(b) after the end of a 6 month period but before the end of the subsequent 6 month period,

interest shall be calculated from the date on which the special damages were incurred to the date of the order.

1974-65-1.

Interest not awarded in certain cases

2. The court shall not award interest under section 1

(a) on that part of an order that represents pecuniary loss arising after the date of the order;

(b) where there is an agreement about interest between the parties;

(c) on interest or on cost; or

(d) where the creditor waives in writing his right to an award of interest.

1974-65-2.

Default order

3. Where an order is obtained by default under an Act or the Rules of Court, the registrar of the court may exercise and carry out the powers and duties of the court under this Act.

1974-65-3.

Payment into court

4. Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains an order for an amount equal to or less than that paid into court, the court shall, notwithstanding section 1, award interest only as if the date of payment into court had been the date of the order.

1974-65-4.

Interest included in judgment

5. Interest added to an order for payment under this act shall be included in the order for enforcement purposes.

1974-65-5.

Effective date

6. This Act does not apply to a cause of action that arose before June 1, 1974.

1974-65-6.

AMENDMENTS NOT IN FORCE

Court Order Interest Amendment Act, 1982
S.B.C. 1982, c. 47, ss. 1 to 5

(Effective on the date sections 12 to 15 of the *Interest Act* (Canada) cease to have effect in B.C.)

1. The *Court Order Interest Act*, R.S.B.C. 1979, c. 76, is amended by adding the following heading before section 1:

PART 1

Prejudgment Interest

2. Section 1 (1) is amended by striking out ", but the rate shall not be less than the rate that applies to interest on a judgment under the *Interest Act* (Canada),".

3. Sections 3 and 5 are amended by striking out "under this Act" and substituting "under this Part".

4. Section 6 is amended by striking out "This Act" and substituting "This Part".

5. The following Part is added after section 6:

PART 2

Post-Judgment Interest

Interest rate

7. (1) In this section "interest rate" means an annual simple interest rate that is equal to the prime lending rate of the banker to the government.

(2) A pecuniary judgment shall bear simple interest from the later of the date the judgment is pronounced or the date money is payable under the judgment.

(3) During the first 6 months of a year interest shall be calculated at the interest rate as at January 1 and during the last 6 months interest shall be calculated at the interest rate as at July 1.

(4) Notwithstanding subsection (2), interest in respect of a judgment pronounced before the coming into force of this Part shall be calculated from the later of the date this Part comes into force or the date money is payable under the judgment.

Court may vary rate

8. Where the court of original jurisdiction considers it appropriate, it may, on the application of a person affected by or interested in a judgment, vary the rate of interest applicable under section 7 or fix a different date from which interest shall be calculated.

Interest deemed included in judgment

9. (1) Interest under this Part shall be deemed to be included in the judgment for enforcement purposes.

(2) A partial payment of a judgment shall be applied first to outstanding interest owed on the judgment.

Appendix B

THE COMMISSION'S PRIOR WORK

A. Introduction

This appendix examines recommendations for reform of the law respecting prejudgment interest made by the Commission in its *Report on Pre-Judgment Interest*,[1] issued in 1973, as well as those made in several recent Reports.[2] A review of the recommendations made in the original Report issued by the Commission on prejudgment interest is useful in understanding the policy which underlies the Act, and the extent to which the present Act conforms to the Commission's earlier recommendations.

B. Report on Pre-Judgment Interest

1. The Pre-Existing Law

This Report[3] examined the law of British Columbia respecting the right of a plaintiff to recover interest on a sum of money awarded to him at trial. That law was technical and complicated.[4] As a general rule, interest was not levied on common law claims in the absence of agreement. In particular, at common law, interest was not payable upon money awards for damages in tort.[5] Courts of equity would, however, permit the recovery of interest in some cases involving claims brought against certain classes of defendants.[6]

Before 1974, the only legislation in force in British Columbia on the question of prejudgment interest was *Lord Tenterden's Act*.[7] This Imperial legislation was received law in British Columbia.[8] It provided that on the trial of "any issue" a jury could award a "creditor" interest if the debt was payable by written instrument at a date certain, and if not at a date certain, from the date of demand if the demand specified that interest would be claimed.[9] Specific provision was also made in *Lord Tenterden's Act* for interest on claims in trover or conversion.[10] The Commission concluded:[11]

> A reading of Lord Tenterden's Act makes it clear that relatively little significant change was accomplished. It does not apply to tort claims, except to the extent specified in section 29, nor to contract claims for unliquidated sums, and it is now clear beyond doubt that, as was held by the British Columbia Court of Appeal in *Triangle Storage Ltd.* v. *Porter*, "interest does not attach because payment has been 'improperly withheld'."

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[1] LRC 12, 1973.

[2] *Minor Report on Interest and Jurisdictional Limits in the County and Provincial Courts* (L.R.C. 59, 1982) printed in Annual Report, (L.R.C. 60, 1982) Appendix C at 26; *Report on Foreign Money Liabilities*, (LRC 65, 1983); *Report on Settlement Offers*, (LRC 77, 1984).

[3] *Supra*, n. 1. This Report is out of print, and accordingly the Commission is unable to respond to requests for copies.

[4] *Ibid.* at 8-9.

[5] *Ibid.*

[6] *Ibid.*

[7] The short title is the *Civil Procedure Act, 1833*, 3 & 4 Will 4, c. 42.

[8] *Supra*, n. 1 at 10; *see Okanagan Mainline Real Estate Board* v. *Canadian Indemnity Co.*, (1969) 70 D.L.R. (2d) 516, 66 W.W.R. (N.S.) 257, 267 (B.C.S.C.); *English Law Act*, R.S.B.C. 1960, c. 129, s. 2, now the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s.2.

[9] *Supra*, n. 7, s. 28.

[10] *Ibid.* s. 29.

[11] *Supra*, n. 1 at 11. It is not clear whether or to what extent the *Court Order Interest Act* has entirely replaced the law governing prejudgment interest under *Lord Tenterden's Act*, or those cases in which prejudgment interest was payable at law or in equity. In *McKay* v. *Himmel Holdings Corp.*, (1983) 51 B.C.L.R. 74 (B.C.C.A.), prejudgment interest was said to be available in equity or under *Lord Tenterden's Act* in a specific performance action. The judgment is silent on the possible application of the *Court Order Interest Act*. *Cf. Hallwachs* v. *Cloverdale Industrial Estates Ltd.*, (1982) 37 B.C.L.R. 200 (B.C.S.C.) in which, in a similar case, the *Court Order Interest Act* was said not to apply in the face of the *Interest Act* (Canada), R.S.C. 1970, c. I-18, if there is an agreement about interest. Support for the approach in *McKay*, insofar as the *Interest Act* is concerned, may be found in *British Pacific Properties Ltd.* v. *Min. of Highways and Public Works*, (1980) 112 D.L.R. (3d) 1, [1981] 1 W.W.R. 666 (S.C.C.).

2. The Thrust of Reform

The main policy ground which led to the recommendation that prejudgment interest legislation be enacted was embodied in the Commission's first recommendation:[12]

> 1. Reforming legislation should clearly embody the principle that interest is a form of compensation for the loss of use of money.

The intent of the Commission's recommendations was to remedy the loss suffered by a plaintiff kept out of his money by a defendant.

A number of important consequences flow from this perception of the role of prejudgment interest. Most important, once it is conceded that prejudgment interest compensates the plaintiff for the loss of use of money to which he has a right, it follows logically that the right to prejudgment interest should be absolute. Where the plaintiff is given a judgment for the payment of money, it is incontrovertible that the defendant has retained money which he ought to have paid to the plaintiff. To adopt a metaphor, the fruit of the tree should properly go to the tree's owner. It was accordingly recommended that courts be given no discretionary power to deprive a plaintiff of interest to which he would otherwise be entitled. The Commission recommended that:[13]

> 3. Interest prior to judgment be recoverable as a matter of right, regardless of the nature of the cause of action, in all actions for the recovery of a judgment sounding in money.
>
> 9. The Court should not be given a discretionary power to deprive a plaintiff of pre-judgment interest where he is otherwise entitled to it.

Another example of a recommendation based on this approach involves post-judgment loss. To the extent that a judgment for a sum of dollars includes compensation for losses which will only be sustained after the date of the judgment, it cannot be said that the plaintiff has "been kept out of his money." The Commission, therefore, recommended that:[14]

> 4. The only exception to the recommendation that interest prior to judgment be recoverable as a matter of right should be that no interest be recoverable on economic losses arising after the date of trial.

A number of subsidiary recommendations were also made.

The Commission was of the view that, as a matter of principle, the nature of the claim giving rise to a liability to pay money should not be relevant to the right to prejudgment interest. In particular, it was thought irrelevant that the plaintiff's right which had been infringed was one not usually measured in money.

The Commission concluded:[15]

> It should be re-emphasized at this point that, in the opinion of the Commission, the entitlement to interest is based upon the fact that the plaintiff ought to be compensated for the fact that he has been forced to wait for payment. It is simply irrelevant whether the defendant had any good reasons for failing to put the plaintiff in funds at an earlier date. Defendants must pay interest because they have delayed in paying the "principal," not because they have delayed unnecessarily in doing so.

3. The Recommendations and their Implementation

The Report contained 14 recommendations, most of which were embodied in the *Prejudgment Interest Act*.[16] Only the following recommendations were not specifically adopted.

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[12] *Supra*, n. 1 at 19.
[13] *Ibid.* at 19 and 25, respectively.
[14] *Ibid.* at 19.
[15] *Ibid.*
[16] S.B.C. 1974, c. 65.

2. Reforming legislation should clearly embody the principle that interest is a form of compensation for the loss of use of money.
7. Where a payment made into Court by a defendant is accepted by the plaintiff, that payment be deemed to include an amount in respect of interest to the date of payment in.
10. The rate at which a plaintiff be entitled to recover interest be that allowed by law.

Only Recommendations 2, 7 and 10 were not acted on. Recommendation 2 embodies a general principle, and its absence from the *Court Order Interest Act* has not caused any problems. Our *Report on Settlement Offers*,[17] addressed the question of prejudgment interest in cases in which payment into court is made. This was the question raised by Recommendation 7.

Recommendation 10 was not accepted by the Legislature. Instead, section 1 of the *Court Order Interest Act* permits the court to award interest at the rate it feels to be appropriate in the circumstances, with a floor at the rate prescribed by the *Interest Act* (Canada).[18] The Commission was of the view that permitting a higher rate of interest might trench upon the federal power over interest.[19] The legislature, however, took a more robust view of the Province's constitutional jurisdiction. This view was vindicated in recent decisions of the British Columbia Court of Appeal and of the Supreme Court of British Columbia, in which it was held that in the absence of federal legislation occupying the field of prejudgment interest, it was open to the province to enact such legislation by virtue of its power to make laws in respect of property and civil rights and the administration of justice in the province.[20]

In four instances the *Court Order Interest Act* goes beyond the Commission's recommendations. Section 3 of the Act confers upon the registrar of a court the power to add a sum in respect of prejudgment interest to any judgment obtained by default. This is a necessary and self-explanatory administrative provision, as is section 5, which provides that interest is deemed part of the judgment for the purposes of enforcement. Section 2(c) of the Act provides that a waiver of interest is effective to exclude an award of prejudgment interest, thereby removing any argument that a "waiver" of interest does not constitute an "agreement about interest," which, under section 2, is effective to exclude prejudgment interest. Section 2(d) prohibits an award of prejudgment interest on costs.

C. Minor Report on Interest and Jurisdictional Limits in the County and Provincial Courts

This Minor Report[21] examined the question of whether the Provincial and County Courts had jurisdiction to award a sum of prejudgment interest when that interest, combined with the principal judgment, amounted to a sum in excess of the monetary jurisdiction of these courts. The limits were $2,000 and $25,000 respectively at the date of the Report.[22] In *Buckler* v. *Earthwood*

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[17] LRC 77, 1984.

[18] R.S.C. 1970, c. I-18. That rate is currently 5%: *see* s. 13. The reference to the interest rate set by the *Interest Act* (Canada) will be deleted when the *Interest Act* ceases to apply to British Columbia, and the post-judgment interest provisions of the *Court Order Interest Act Amendment Act*, S.B.C. 1982, c. 47 come into force *see* Chapter XII.

[19] *Supra*, n. 1 at 26.

[20] *K.R.M. Construction Ltd.* v. *British Columbia Railway Company*, (1982) 40 B.C.L.R. 1, 35-38 (B.C.C.A.); *United Grain Growers Ltd.* v. *Mott Electric Ltd.*, (1981) 124 D.L.R. (3d) 434, 29 B.C.L.R. 197 (B.C.S.C.). The applicability of section 3 of the *Interest Act* would be in doubt in any event, since it has been held in an analogous case that where an interest rate is established by a tribunal of competent jurisdiction, then the rate chosen is established by law and the *Interest Act* limit of 5% does not apply: *See British Pacific Properties Ltd.* v. *Minister of Highways and Public Works*, *supra*, n. 11; *Prince Albert Pulp Co.* v. *Foundation Co. of Canada*, [1977] 1 S.C.R. 200 at 211, (1976) 68 D.L.R. (3d) 283, 291, [1976] 4 W.W.R. 586 (S.C.C.).

[21] LRC 59, 1982.

[22] *Small Claim Act*, R.S.B.C. 1979, c. 387, s. 2; *County Court Act*, R.S.B.C. 1979, c. 72, s. 29; (since increased to $50,000, *Miscellaneous Statutes Amendment Act (No. 2)*, S.B.C. 1984, c. 26, s. 2).

Manufacturing Ltd.,[23] it was held that prejudgment interest had to be taken into account when determining whether a claim falls within the jurisdiction of the Provincial Court, since, on the authority of *Kellner* v. *Greig*,[24] prejudgment interest was to be regarded as part of a "claim" for which action was brought.

While not stating any final view on the correctness of the *Buckler* case, the Commission concluded that as a practical matter, any doubt respecting the monetary jurisdiction of these two courts should be cleared up by amending legislation providing that interest could be added to a judgment even if the total exceeded their monetary jurisdiction.[25] This recommendation was implemented in 1984.[26]

D. Report on Foreign Money Liabilities

This Report[27] examined the rules of private international law in force in British Columbia governing the enforcement of foreign money obligations, and in particular, section 11 of the *Currency and Exchange Act* (Canada).[28] That Act provides that monetary obligations must be stated in Canadian dollars in all court proceedings.

The Report concludes that there exists no impediment to the enactment of legislation, and consequential amendments to the Rules of Court, to permit courts to make orders expressed in terms of a foreign currency when that currency will "most fully and exactly compensate" the plaintiff.[29] The Commission further recommended that for the purposes of satisfying the judgment, the relevant date for conversion into Canadian currency should be the date of payment.[30]

In formulating its recommendations, the Commission noted that the court's power under the *Court Order Interest Act* to set a rate of prejudgment interest was very flexible. In considering the *quantum* of an award properly expressed in the currency of another jurisdiction, it is open to the court to have regard to the interest rates payable in that jurisdiction.[31] Hence, if the plaintiff's loss was properly expressed in Brazilian cruzeiros, and if the going interest rate in Brazil at the relevant time was 400% per annum, it would be appropriate for the court, in the exercise of its discretion under section 1(1) of the *Court Order Interest Act*, to increase the award in cruzeiros by 400% per annum to the date of judgment. This amount would then be converted into Canadian dollars at the date of payment.[32]

There would be an obvious distortion, however, if prejudgment interest on a principal debt expressed in cruzeiros is made payable at the going Canadian rate, or if the principal amount were first converted into Canadian dollars, and prejudgment interest then added at the Brazilian rate. This is because a large component of interest reflects inflation inherent in a currency.[33] For that reason, interest rates are not transferrable between currencies.

Although this point was explicitly recognized in one early English case dealing with prejudgment interest and foreign currency,[34] in a subsequent

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[23] (1980) 18 C.P.C. 223, (1980) 4 A.C.W.S. (2d) 206 (B.C. Co. Ct.).
[24] (1979) 103 D.L.R. (3d) 244, 15 B.C.L.R. 126, 11 C.P.C. 69 (B.C.C.A.).
[25] LRC 59, 1982.
[26] *Miscellaneous Statutes Amendment Act (No. 2)*, *supra*, n. 22.
[27] LRC 65, 1983.
[28] R.S.C. 1970, c. C-39; *see supra*, n. 27 at 46 *et seq.*
[29] *Supra*, n. 27 at 60.
[30] *Ibid.* at 60, recommendation 2(b).
[31] *Ibid.* at 39-42.
[32] Presumably, the severe inflation would have caused the Canadian dollar to rise rapidly against the cruzeiro.
[33] *Supra*, n. 27 at 40.
[34] *Miliangos* v. *Geo. Frank (Textiles) Ltd. (No. 2)*, [1976] 3 W.L.R. 477, [1975] 1 All E.R. 1076 (C.A.).

case[35] interest on a judgment expressed in Maltese currency was awarded at rates prevailing in respect of German marks, the plaintiff being a German company. In order to clear up any uncertainty respecting the practice in British Columbia when a foreign currency is in issue, the Commission recommended that:[36]

> The *Court Order Interest Act* should be amended by adding a provision to the effect that the court, in the exercise of its discretion as to the rate of interest, should, when awarding interest on a judgment stated in a foreign currency, have regard to the foreign interest rates which prevail with respect to that currency.

The recommendations for reform contained in the *Report on Foreign Money Liabilities* have yet to be implemented.

E. Report on Settlement Offers

The failure to implement Recommendation 7 contained in the Commission's *Report on Pre-Judgment Interest* led to a certain amount of confusion in British Columbia courts. That recommendation provided that payment into court be deemed to include compensation for prejudgment interest. The British Columbia Court of Appeal held initially in *obiter dicta* that payment in was not deemed to include prejudgment interest.[37] In the later case of *Kellner* v. *Greig*,[38] the point was reconsidered and it was held that payments into court should be deemed to include amounts payable by way of prejudgment interest. A similar result obtained in a recent case in respect of the defendant's offer to settle.[39]

The significance of these cases in view of the potential liability of the defendant for increased costs, or the potential penalty in costs to a plaintiff who refuses to accept a payment in and then recovers a lesser amount at trial, was one of a number of problems discussed by the Commission in its *Report on Settlement Offers*.[40] That Report, and these issues, are examined in more detail in Chapter XI of this Report.

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[35] *Helmsing Schiffarts G.M.B.H. & Co.* v. *Malta Drydocks Corp.*, [1977] 2 Lloyd's Rep. 444; *see also Airtemp* v. *Chrysler Airtemp Can. Ltd.*, (1981) 121 D.L.R. (3d) 236, 31 O.R. (2d) 481 (Ont. Div. Ct.); *Bedford* v. *Shaw*, (1981) 23 C.P.C. 12, 33 O.R. 766 (Ont. S.C.); *Arras Gallery Ltd.* v. *Ontario*, (1985) 29 B.L.R. 259 (Ont. H.C.).

[36] *Supra*, n. 27 at 60.

[37] *Evans Products Ltd.* v. *Crest Warehousing Ltd. (No. 2)*, (1978) 6 B.C.L.R. 177 (B.C.C.A.).

[38] *Supra*, n. 24.

[39] *Uptown* v. *Walker*, (1979) 3 B.C.L.R. 4 (B.C.S.C.).

[40] LRC 77, 1984

Appendix C

DEVELOPMENTS IN OTHER JURISDICTIONS

A number of law reform agencies have had the subject of prejudgment interest under review. The Conference of the Commissioners of Uniformity in Canada added this topic to their agenda in 1975, and in 1982 settled a Uniform *Judgment Interest Act*.[1] In Ontario, the *Courts of Justice Act, 1984* confers a power upon Ontario courts to award prejudgment interest in a manner which differs from that conferred by the *Court Order Interest Act* in a number of significant respects.[2] The Law Reform Commission of Manitoba published its *Report on Prejudgment Compensation on Money Awards: Alternatives to Interest*[3] in 1982. Legislatures in Nova Scotia, Prince Edward Island, Alberta and Manitoba have enacted prejudgment interest legislation.[4]

Elsewhere in the Commonwealth, the Law Commission of England has published a *Report on Interest*.[5] This Report deals, *inter alia*, with the question of prejudgment interest on debts and has led to a substantial modification of the English law respecting prejudgment interest. Two Australian law reform agencies have also issued reports on this topic. In 1983, the New South Wales Law Reform Commission issued its *Community Law Reform Program Second Report; Interest on Certain Debts*, examining the English Law Commission's *Report on Interest*.[6] The Law Reform Commission of Western Australia issued a *Report on Pre-Judgment Interest*[7] in 1981.

The last decade has seen unprecedented litigation concerning prejudgment interest in England, Australia, Canada and the United States. In England and Australia the House of Lords, Privy Council and High Court of Australia have settled many of the principles which guide their subordinate courts in awarding prejudgment interest.[8] Their judgments are highly instructive. In British Columbia, numerous decisions of trial courts and of the Court of Appeal may be found which parallel those of other Commonwealth courts. In other cases, the principles laid down by our courts are unique to this jurisdiction.

In the United States, both courts and legislatures have implemented schemes under which some form of prejudgment compensation is payable. These schemes range from legislation, to rules of court, to treating prejudgment interest as an element of damages recoverable at common law. The features of these schemes vary dramatically from state to state. Notwithstanding the sheer volume of litigation, however, it would appear that for the most part the American jurisprudence is concerned with the recoverability of prejudgment interest *per se*.[9] American courts have been less concerned with refining the principles which should guide the court in assessing the *quantum*

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[1] *See* n. 9 of Chapter I.

[2] S.O. 1984, c. 11, s. 137-141, replacing An Act to Amend the *Judicature Act*, S.O. 1977, c. 51, s. 3, adding a new section 38 to the *Judicature Act*. The section was re-numbered as s. 36 in the *Judicature Act*, R.S.O. 1980, c. 223. *See* H.D. Pitch, "Payment Into Court and Prejudgment Interest," (1981) 2 Adv. Q. 347; H.J. Kirsch, "Considerations Relating to the Interest Act and Prejudgment Interest Under the Judicature Act,"(1982) 3 Adv. Q. 103; R. Roth, "Prejudgment Interest and the Personal Injury Action," (1983) 4 Adv. Q. 219.

[3] Report No. 47, (1982).

[4] *The Judicature Act*, C.S.N.S. 1979, c. J-3, s. 38(9)-(11) (Nova Scotia); *Judicature Act*, R.S.P.E.I. 1974, c.J-3 as amended by S.P.E.I. 1982, C-13, s. 1; *Judgment Interest Act*, R.S.A. 1980, c. J-0.5, (1984); *Judgment Interest and Discount Act*, S.M. 1986, c. 39.

[5] Law Com. No. 88, (1978) Cmnd. 7729.

[6] LRC 35, 1983.

[7] Project No. 70, Part I.

[8] For a survey of Australian developments, *see* D.I. Cassidy, "Interest at Common Law," (1982) 56 Aus. L.J. 213.

[9] *See, e.g.*, M.K. Brown, "The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases,"(1982) 16 U.S.F.L. Rev. 325.

of prejudgment interest or the manner in which it ought to be calculated.[10] In this respect, Commonwealth courts have little to learn from American jurisprudence.

Reference will be made to these reform developments throughout this Report. American law will not be canvassed in detail, but will be referred to when appropriate.

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[10] For general surveys of the American law, *see*: K.W. Seifried, "Recovery of Prejudgment Interest on an Unliquidated State Claim Arising Within the Sixth Circuit, (1977) 46 U. of Cincinnati L. Rev. 151; M.K. Brown, *supra*, n. 9; C.T. McCormick, "Interest as Damages," (1931) 9 N.C.L. Rev. 237; A.E. Rothschild, "Pre judgment Interest: Survey and Suggestion," (1982) 77 N.W.U. L. Rev. 192; J.A. Williams, "Prejudgment Interest: An Element of Damages Not to be Overlooked," (1977) 8 Cumb. L. Rev. 521.

Appendix D

THE ANALYSIS IN *KILLEEN* v. *KLINE*

A. The Example

Set out below is the example and the calculations provided by Lambert J.A. in *Killeen* v. *Kline*, (1982) 33 B.C.L.R. 225 at 247:

> *Relationship between lump sum in damages computed as of the date of death and as of the date of trial*
>
> Suppose that time t = 0 represents the date of death and time t = 4 represents the date of trial, four years later. Suppose also that the losses amount to $1,000 each year, as of the end of each year, for a term of 25 years following the date of death.
>
> We seek the lump sum equivalent of the specified annual losses, determined as of the date of trial, t = 4. We will ignore survival probabilities and other contingencies, so that all of the necessary factors can be read from interest tables at, say, 7%. There are two different approaches one may take.
>
> *FIRST APPROACH.*
>
> (*Weiser* v. *Pearson*; *Cookson* v. *Knowles*)
>
> Determine the amount of the past losses, up to and including t = 4, plus interest up to t = 4. This value can be read directly from the tables and the answer if $1,000 × 4.43994 = $4,439.94. Now we need to add the discounted value of the remaining 21 future years' payment. The required factor can be read directly from the tables and the answer is $1,000 × 10.83553 = $10,835.53. The final answer is the sum of the past losses plus interest thereon, plus the present value of the future losses, or $4,439.94 + $10,835.53 = $15,275.47, determined as at t = 4.
>
> *SECOND APPROACH.*
>
> (*Roed* v. *Tahsis*; *Ruby* v. *Marsh*)
>
> Determine the discounted value of the stream of losses as at t = 0. The required factor can be read directly from the tables and the answer is $1,000 × 11.65358 = $11,653.58. Now credit interest on that sum for the period of 4 years, up to t = 4. The required factor can be read directly from the tables and the answer becomes $11,653.58 × 1.310796 = $15,275.47.

B. Alternative Calculation Comparisons

Example 1

Facts taken from *Killeen* v. *Kline* at 248-249 (B.C.L.R., B.C.C.A.)

Dependency: $37,946 p.a.
No. of Years Dependency will last: 5
No. of years tort to trial: 2
Discount Rate: 2.5%
Prejudgment Interest Rate: 7%; 10%; 15%

Approach No. 1

Discount loss to date of death, and add prejudgment interest at the full rate to the whole award:

Compounding prejudgment interest

at 7% = $206,881.00
at 10% = $218,644.40
at 15% = $238,972.90

Not compounding prejudgment interest

at 7% = $205,995.60
at 10% = $216,837.50
at 15% = $234,907.20

Approach No. 2

Calculate past loss separately. Calculate future loss and discount to date of trial. Add prejudgment interest to the past component only.

Compounding prejudgment interest

at 7% = $195,130.60
at 10% = $198,739.30
at 15% = $204,905.50

Not compounding prejudgment interest

at 7% = $194,944.70
at 10% = $198,359.80
at 15% = $204,051.70

Example 2

Dependency: $10,000 p.a.
No. of years dependency will last: 25
No. of years, tort to trial: 5
Discount Rate: 2.5%
Prejudgment Interest Rate: 7%, 10%, 15%

Approach No. 1

Discount loss to date of death, and add prejudgment interest to the whole award:

Compounding prejudgment interest

at 7% = $264,871.80
at 10% = $304,144.60
at 15% = $379,844.50

Not compounding prejudgment interest

at 7% = $254,947.30
at 10% = $283,274.80
at 15% = $330,487.30

Approach No. 2

Calculate past loss separately. Calculate future loss and discount to date of trial. Add prejudgment interest to the past component only:

Compounding prejudgment interest

at 7% = $221,321.80
at 10% = $226,945.00
at 15% = $237,326.30

Not compounding prejudgment interest

at 7% = $220,288.90
at 10% = $224,788.90
at 15% = $232,288.90

Appendix E

THE MULTIPLIER SCHEME AND A COMPLICATED PERSONAL INJURY CASE

A. The Example

This example is intended only to illustrate the operation of the multiplier scheme. The heads of loss and the dollar values given are not intended to reflect an actual case. The *quantum* of damages is set at essentially arbitrary amounts, and may not be actuarially sound, and the benefits paid may not accord with I.C.B.C. practice.

B. The Facts

The plaintiff is a twenty-four year old carpenter, injured in a car accident attributable entirely to the gross negligence of the defendant. The defendant was insured by I.C.B.C. The accident occurred on December 15, 1981, and judgment was rendered November 4, 1986. The plaintiff was rendered paraplegic and has extremely limited future prospects. He will require therapy and some assistance into the indefinite future. He has found employment as a parking lot attendant at $800/month, effective September 1, 1986.

The damage award was based on the following data and figures, which are, when appropriate, given net of any deduction required by law.

1. Non-Pecuniary Loss (Adjusted for Inflation)

Pain, Suffering and Loss of Amenities $125,000.00

2. Pecuniary Loss

(a) Past Pecuniary Loss

(i) Lost Wages

— Former Salary: $2000/month
— Overtime: average $250/month
— Possibility of layoff: The employer laid off carpenters February to June, 1984 and December, 1985 to March, 1986
— New Salary: $800/month

(ii) Expenses

(1) Drugs and rehabilitative supplies, hospital charges:

December 1981	$ 350.00	February	$ 32.25
January 1982	500.00	March	57.00
February	1,250.00	April	25.00
March	400.00	May	100.00
April	250.00	June	125.00
May	125.00	July	62.00
June	125.00	August	93.00
July	125.00	September 1983	156.00
August	125.00	October	68.50
September	100.00	November	100.00
October	100.00	December	125.00
November	50.00	January 1984	1,100.00
December	50.00	February	162.30
January 1983	116.80	March	15.00

April 1984	$ 25.00	March	$ 86.15
May	64.00	November	25.00
June	17,500.00	December	100.00
(purchase of special van)		January 1986	124.00
July	85.00	September	500.00
August	53.00	October	64.00
January 1985	169.08	November	500.00
February	25.00		

(iii) Rehabilitative Therapy

Commencing September, 1982 to date: $1,500/month.

(iv) Assistance with Household Tasks

Commencing September, 1982 to date: $250/month.

(v) Occupational Reassessment and Job Retraining

November 1982: $2,500.00

3. Future Pecuniary Loss
(Present value at date of judgment)

(a) Cost of Future Care:	$130,000.00
(b) Cost of Future Equipment (including van replacement):	85,000.00
(c) Lost Income:	500,000.00
(d) Investment Counselling:	23,000.00
(e) Cost of specialized apartment:	65,000.00

4. Interim Payments and No-fault Benefits Paid before Judgment

(a) Voluntary Payments

— $5,000 at June and December of each year, commencing June, 1982

— $18,000 in July, 1984 (purchase of van)

(b) No-fault Benefits

(i) Past Disability Benefits

— February 15, 1982	$ 800.00
— February 28, 1982	200.00
— Thereafter at $400/month to date of judgment	
(ii) Future Disability Benefits (present value)	$175,000.00

(iii) Past Medical/Rehabilitiation Benefits

— June 1982	$ 3,000.00
— March 1983	759.05
— December 1983	854.50
— January 1986	19,658.53

(iv) Future Medical/Rehabilitation Benefits (present value)	$ 60,000.00

C. Calculation of Prejudgment Interest

A Note on the Calculations

For the purposes of this example, the calculations have been worked through in a detailed fashion. This was done to fully illustrate the scheme. In practice a number of "short-cuts" can be taken that would considerably simplify these calculations.

First, the whole process lends itself to the use of a computer. With a suitable program, the burden on the user can be reduced to the entry of basic data.

Second, even if a computer is not employed, the credits to the plaintiff and the defendant respecting past pecuniary loss and interim payments need not be set out in two separate tables. In most cases, the two tables can be combined so that reference to the multiplier table would be necessary only once for each month in the pre-trial period.

1. NON-PECUNIARY LOSS

Pain, Suffering and Loss of Amenities
(December, 1981; Table B)
$125,000 × 1.187 ..... $148,375.00

2. PAST PECUNIARY LOSS

(a) Credits to Plaintiff

Month	CREDITS TO PLAINTIFF Total of All Past Pecuniary Loss Attributable to the Month	Multiplier From Table A	Total
			$
Dec. 1981	$1,125 + 350 = 1,475	1.806	2,663.85
Jan. 1982	$2,250 + 500 = 2,750	1.780	4,895.00
Feb. 1982	$2,250 + 1,250 = 3,500	1.755	6,142.50
Mar. 1982	$2,250 + 400 = 2,650	1.732	4,589.80
Apr. 1982	$2,250 + 250 = 2,500	1.709	4,272.50
May 1982	$2,250 + 125 = 2,375	1.685	4,001.88
June 1982	$2,250 + 125 = 2,375	1.662	3,947.25
July 1982	$2,250 + 125 = 2,375	1.639	3,892.63
Aug. 1982	$2,250 + 125 = 2,375	1.615	3,835.63
Sept. 1982	$2,250 + 100 + 1,500 + 250 = 4,100	1.592	6,527.20
Oct. 1982	$2,250 + 100 + 1,500 + 250 = 4,100	1.572	6,445.20
Nov. 1982	$2,250 + 50 + 1,500 + 250 + 2,500 = 6,550	1.553	10,172.15
Dec. 1982	$2,250 + 50 + 1,500 + 250 = 4,050	1.535	6,216.75
*Jan. 1983	$2,250 + 116.80 + (1,750) = 4,116.80	1.519	6,253.42
Feb. 1983	($4,000) + 35.25 = 4,035.25	1.504	6,069.02
Mar. 1983	($4,000) + 57.00 = 4,057	1.489	6,040.87
Apr. 1983	($4,000) + 25.00 = 4,025	1.476	5,940.90
May 1983	($4,000) + 100.00 = 4,100	1.462	5,994.20
June 1983	($4,000) + 125.00 = 4,125	1.449	5,977.13
July 1983	($4,000) + 62.00 = 4,062	1.436	5,833.03
Aug. 1983	($4,000) + 93.00 = 4,093	1.423	5,824.34
Sept. 1983	($4,000) + 156.00 = 4,156	1.411	5,864.12
Oct. 1983	($4,000) + 68.50 = 4,068.50	1.398	5,687.76
Nov. 1983	($4,000) + 100.00 = 4,100	1.386	5,682.60
Dec. 1983	($4,000) + 125.00 = 4,125	1.373	5,663.63
Jan. 1984	($4,000) + 1,100.00 = 5,100	1.361	6,941.10
Feb. 1984	$162.30 + (1,750) = 1,912.30	1.349	2,579.69
Mar. 1984	$15.00 + (1,750) = 1,765	1.337	2,359.81
Apr. 1984	$25.00 + (1,750) = 1,775	1.325	2,351.88
May 1984	$64.00 + (1,750) = 1,814	1.313	2,381.78
June 1984	$17,500 + (1,750) = 19,250	1.301	25,044.25
July 1984	($4,000) + 85.00 = 4,085	1.288	5,261.48
Aug. 1984	($4,000) + 53.00 = 4,053	1.275	5,167.58
Sept. 1984	($4,000)	1.261	5,044.00
Oct. 1984	($4,000)	1.247	4,988.00
Nov. 1984	($4,000)	1.234	4,936.00
Dec. 1984	($4,000)	1.222	4,888.00

Month	CREDITS TO PLAINTIFF—*Continued* Total of All Past Pecuniary Loss Attributable to the Month	Multiplier From Table A	Total
			$
Jan. 1985	($4,000) + 169.08 = 4,169.08	1.210	5,044.59
Feb. 1985	($4,000) + 25.00 = 4,025	1.199	4,825.98
Mar. 1985	($4,000) + 86.15 = 4,086.15	1.188	4,854.35
Apr. 1985	($4,000)	1.177	4,708.00
May 1985	($4,000)	1.167	4,668.00
June 1985	($4,000)	1.157	4,628.00
July 1985	($4,000)	1.147	4,588.00
Aug. 1985	($4,000)	1.137	4,548.00
Sept. 1985	($4,000)	1.127	4,508.00
Oct. 1985	($4,000)	1.118	4,472.00
Nov. 1985	($4,000) + 25.00 = 4,025	1.109	4,463.73
Dec. 1985	($1,750) + 100.00 = 1,850	1.100	2,035.00
Jan. 1986	($1,750) + 124.00 = 1,874	1.091	2,044.53
Feb. 1986	$1,750	1.082	1,893.50
Mar. 1986	$1,750	1.072	1,876.00
Apr. 1986	($4,000)	1.061	4,244.00
May 1986	($4,000)	1.051	4,204.00
June 1986	($4,000)	1.041	4,164.00
July 1986	($4,000)	1.032	4,128.00
Aug. 1986	($4,000)	1.024	4,096.00
Sept. 1986	($4,000) + 500.00 = 4,500 − 800 = 3,700	1.016	3,759.20
Oct. 1986	($4,000) + 64.00 = 4,064 − 800 = 3,264	1.008	3,290.11
Nov. 1986	($4,000) + 500 = 4,500 − 800 = 3,700	1.000	3,700.00
		Total:	$301,119.92

* Some of the figures in the middle column of the table of Credits to the Plaintiff for Past Pecuniary Loss are in parentheses. This indicates that the figure is the sum of two or more figures that recur in the table. For example, (1,750) is usually the total of housekeeping expenses and rehabilitative therapy, and ($4,000) is that same figure with lost wages and overtime added.

(b) Credits to Defendant

(i) Voluntary Payments

Date Received	Amount	Multiplier	Total
June 1982	$ 5,000	1.662	$ 8,310.00
Dec. 1982	5,000	1.535	7,675.00
June 1983	5,000	1.449	7,245.00
Dec. 1983	5,000	1.373	6,865.00
June 1984	5,000	1.301	6,505.00
July 1984	18,000	1.288	23,184.00
Dec. 1984	5,000	1.222	6,110.00
June 1985	5,000	1.157	5,785.00
Dec. 1985	5,000	1.100	5,500.00
June 1986	5,000	1.041	5,205.00
		Subtotal	$82,384.00

(ii) Disability Benefits (Income)

Date Received	Amount	Multiplier	Total
Feb. 1982	$ 1,000	1.755	$ 1,755.00
March 1982	400	1.732	692.80
April 1982	400	1.709	683.60
May 1982	400	1.685	674.00
June 1982	400	1.662	664.80
July 1982	400	1.639	655.60
Aug. 1982	400	1.615	646.00
Sept. 1982	400	1.592	636.80
Oct. 1982	400	1.572	628.80
Nov. 1982	400	1.553	621.20
Dec. 1982	400	1.535	614.00
Jan. 1983	400	1.519	607.60
Feb. 1983	400	1.504	601.60
March 1983	400	1.489	595.60
April 1983	400	1.476	590.40
May 1983	400	1.462	584.80
June 1983	400	1.449	579.60
July 1983	400	1.436	574.40
Aug. 1983	400	1.423	569.20
Sept. 1983	400	1.411	564.40
Oct. 1983	400	1.398	559.20
Nov. 1983	400	1.386	554.40
Dec. 1983	400	1.373	549.20
Jan. 1984	400	1.361	544.40
Feb. 1984	400	1.349	539.60
March 1984	400	1.337	534.80
April 1984	400	1.325	530.00
May 1984	400	1.313	525.20
June 1984	400	1.301	520.40
July 1984	400	1.288	515.20
Aug. 1984	400	1.275	510.00
Sept. 1984	400	1.261	504.40
Oct. 1984	400	1.247	498.80
Nov. 1984	400	1.234	493.60
Dec. 1984	400	1.222	488.80
Jan. 1985	400	1.210	484.00
Feb. 1985	400	1.199	479.60
March 1985	400	1.188	475.20
April 1985	400	1.177	470.80
May 1985	400	1.167	466.80
June 1985	400	1.157	462.80
July 1985	400	1.147	458.80
Aug. 1985	400	1.137	454.80
Sept. 1985	400	1.127	450.80
Oct. 1985	400	1.118	447.20
Nov. 1985	400	1.109	443.60
Dec. 1985	400	1.100	440.00
Jan. 1986	400	1.091	436.40
Feb. 1986	400	1.082	432.80
March 1986	400	1.072	428.80
April 1986	400	1.061	424.40
May 1986	400	1.051	420.40
June 1986	400	1.041	416.40
July 1986	400	1.032	412.80
Aug. 1986	400	1.024	409.60
Sept. 1986	400	1.016	406.40
Oct. 1986	400	1.008	403.20
Nov. 1986	400	1.000	400.00
		Subtotal	$31,533.80

(iii) Medical/Rehabilitation Benefits

Date Received	Amount	Multiplier	Total
June 1982	$ 3,000.00	1.662	$ 4,986.00
March 1983	759.05	1.489	1,130.23
Dec. 1983	854.50	1.373	1,173.23
Jan. 1986	19,658.53	1.091	21,447.46
		Subtotal	$28,736.92

(iv) Total Credits to Defendant for Past Pecuniary Loss

Voluntary Payments	$ 82,384.00
Disability	31,533.80
Medical Benefits	28,736.92
Total	$142,654.72

(c) Total Portion of Judgment Relating to Past Pecuniary Loss

Credit to Plaintiff	$301,119.92
Credit to Defendant	142,654.72
Balance	$158,465.20

3. Future Pecuniary Loss (No Prejudgment Interest)

(a) Credit to Plaintiff

Future Care	$130,000.00
Future Equipment	85,000.00
Lost Income	500,000.00
Investment	23,000.00
Apartment	65,000.00
Total	$803,000.00

(b) Credit to Defendant

Future Disability Benefits	$175,000.00
Future Medical Benefits	60,000.00
Total	$235,000.00

(c) Total Portion of Judgment Relating to Future Loss

Credit to Plaintiff	$803,000.00
Credit to Defendant	235,000.00
Balance	$568,000.00

D. Total Judgment for Plaintiff

(a) Non-Pecuniary Loss	$148,375.00
(b) Past Pecuniary Loss	158,465.20
(c) Future Pecuniary Loss	568,000.00
Total Judgment	$874,840.20

Appendix F

ADDITIONAL MULTIPLIER TABLES

PRIME RATE MULTIPLIERS

December 1986 – February 1987

RATE ADJ. > −0.25%

ADJ. PRIME RATE MULTIPLIERS DEC. 1986

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975	4.057	4.021	3.987	3.957	3.928	3.900	3.871	3.843	3.816	3.788	3.758	3.729
1976	3.699	3.670	3.642	3.613	3.583	3.553	3.524	3.495	3.466	3.437	3.409	3.381
1977	3.354	3.329	3.305	3.281	3.258	3.235	3.213	3.191	3.170	3.149	3.128	3.108
1978	3.087	3.067	3.046	3.026	3.005	2.982	2.960	2.938	2.916	2.893	2.870	2.844
1979	2.818	2.791	2.764	2.738	2.711	2.685	2.659	2.633	2.606	2.580	2.553	2.522
1980	2.492	2.461	2.432	2.402	2.370	2.338	2.312	2.287	2.264	2.242	2.219	2.196
1981	2.171	2.139	2.107	2.076	2.046	2.016	1.984	1.952	1.917	1.882	1.850	1.820
1982	1.794	1.769	1.746	1.722	1.699	1.675	1.652	1.628	1.605	1.584	1.565	1.548
1983	1.531	1.516	1.501	1.487	1.473	1.460	1.447	1.435	1.422	1.409	1.397	1.384
1984	1.372	1.360	1.348	1.336	1.323	1.311	1.298	1.285	1.271	1.257	1.244	1.232
1985	1.220	1.209	1.198	1.187	1.176	1.166	1.156	1.146	1.136	1.127	1.118	1.109
1986	1.100	1.091	1.081	1.069	1.059	1.049	1.041	1.032	1.024	1.016	1.008	1.000
1987												
1988												
1989												

RATE ADJ. > −0.25%

ADJ. PRIME RATE MULTIPLIERS JAN. 1987

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975	4.089	4.053	4.019	3.988	3.959	3.931	3.902	3.874	3.846	3.818	3.788	3.758
1976	3.729	3.699	3.670	3.642	3.611	3.582	3.552	3.523	3.494	3.465	3.436	3.408
1977	3.381	3.356	3.331	3.307	3.284	3.261	3.238	3.217	3.195	3.174	3.153	3.132
1978	3.111	3.091	3.070	3.050	3.029	3.006	2.984	2.961	2.939	2.916	2.892	2.867
1979	2.840	2.814	2.786	2.759	2.732	2.706	2.680	2.654	2.627	2.600	2.573	2.542
1980	2.511	2.481	2.451	2.421	2.389	2.356	2.330	2.305	2.282	2.259	2.237	2.214
1981	2.188	2.156	2.124	2.092	2.062	2.032	2.000	1.967	1.933	1.897	1.864	1.834
1982	1.809	1.783	1.760	1.736	1.712	1.689	1.665	1.641	1.618	1.597	1.577	1.560
1983	1.544	1.528	1.513	1.499	1.485	1.472	1.459	1.446	1.433	1.420	1.408	1.395
1984	1.383	1.371	1.358	1.346	1.334	1.321	1.309	1.295	1.281	1.267	1.254	1.241
1985	1.229	1.218	1.207	1.196	1.185	1.175	1.165	1.155	1.145	1.136	1.126	1.117
1986	1.108	1.099	1.089	1.078	1.067	1.058	1.049	1.040	1.032	1.024	1.016	1.008
1987	1.000											
1988												
1989												

RATE ADJ. > −0.25%

ADJ. PRIME RATE MULTIPLIERS FEB. 1987

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975	4.122	4.085	4.051	4.020	3.991	3.962	3.933	3.905	3.876	3.848	3.818	3.788
1976	3.758	3.729	3.699	3.670	3.640	3.610	3.580	3.551	3.521	3.492	3.463	3.435
1977	3.408	3.382	3.357	3.333	3.310	3.287	3.264	3.242	3.221	3.199	3.178	3.157
1978	3.136	3.115	3.095	3.074	3.053	3.030	3.007	2.985	2.963	2.939	2.915	2.889
1979	2.862	2.836	2.808	2.781	2.754	2.727	2.701	2.675	2.648	2.621	2.593	2.562
1980	2.531	2.501	2.470	2.440	2.408	2.375	2.349	2.323	2.300	2.277	2.255	2.231
1981	2.205	2.173	2.140	2.109	2.079	2.048	2.015	1.983	1.948	1.912	1.879	1.849
1982	1.823	1.798	1.773	1.750	1.726	1.702	1.679	1.654	1.631	1.609	1.590	1.572
1983	1.556	1.540	1.525	1.511	1.497	1.484	1.470	1.457	1.444	1.432	1.419	1.406
1984	1.394	1.381	1.369	1.357	1.344	1.332	1.319	1.305	1.291	1.277	1.264	1.251
1985	1.239	1.228	1.217	1.206	1.195	1.184	1.174	1.164	1.154	1.145	1.135	1.126
1986	1.117	1.108	1.098	1.086	1.076	1.066	1.057	1.048	1.040	1.032	1.024	1.016
1987	1.008	1.000										
1988												
1989												

REAL RATE MULTIPLIERS
December 1986 – February 1987

RATE ADJ. > 0.00%

REAL RATE MULTIPLIERS DEC. 1986

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975	1.517	1.512	1.508	1.503	1.499	1.495	1.490	1.486	1.482	1.477	1.473	1.469
1976	1.465	1.460	1.456	1.452	1.448	1.443	1.439	1.435	1.431	1.427	1.422	1.418
1977	1.414	1.410	1.406	1.402	1.398	1.394	1.390	1.386	1.382	1.378	1.374	1.370
1978	1.366	1.362	1.358	1.354	1.350	1.346	1.342	1.338	1.334	1.330	1.326	1.323
1979	1.319	1.315	1.311	1.307	1.303	1.300	1.296	1.292	1.288	1.285	1.281	1.277
1980	1.273	1.270	1.266	1.262	1.259	1.255	1.251	1.248	1.244	1.241	1.237	1.233
1981	1.230	1.226	1.223	1.219	1.215	1.212	1.208	1.205	1.201	1.198	1.194	1.191
1982	1.187	1.184	1.181	1.177	1.174	1.170	1.167	1.164	1.160	1.157	1.153	1.150
1983	1.147	1.143	1.140	1.137	1.133	1.130	1.127	1.124	1.120	1.117	1.114	1.111
1984	1.107	1.104	1.101	1.098	1.094	1.091	1.088	1.085	1.082	1.079	1.076	1.072
1985	1.069	1.066	1.063	1.060	1.057	1.054	1.051	1.048	1.045	1.042	1.039	1.036
1986	1.033	1.030	1.027	1.024	1.021	1.018	1.015	1.012	1.009	1.006	1.003	1.000
1987												
1988												
1989												

RATE ADJ. > 0.00%

REAL RATE MULTIPLIERS JAN. 1987

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975	1.521	1.517	1.512	1.508	1.503	1.499	1.495	1.490	1.486	1.482	1.477	1.473
1976	1.469	1.465	1.460	1.456	1.452	1.448	1.443	1.439	1.435	1.431	1.427	1.422
1977	1.418	1.414	1.410	1.406	1.402	1.398	1.394	1.390	1.386	1.382	1.378	1.374
1978	1.370	1.366	1.362	1.358	1.354	1.350	1.346	1.342	1.338	1.334	1.330	1.326
1979	1.323	1.319	1.315	1.311	1.307	1.303	1.300	1.296	1.292	1.288	1.285	1.281
1980	1.277	1.273	1.270	1.266	1.262	1.259	1.255	1.251	1.248	1.244	1.241	1.237
1981	1.233	1.230	1.226	1.223	1.219	1.215	1.212	1.208	1.205	1.201	1.198	1.194
1982	1.191	1.187	1.184	1.181	1.177	1.174	1.170	1.167	1.164	1.160	1.157	1.153
1983	1.150	1.147	1.143	1.140	1.137	1.133	1.130	1.127	1.124	1.120	1.117	1.114
1984	1.111	1.107	1.104	1.101	1.098	1.094	1.091	1.088	1.085	1.082	1.079	1.076
1985	1.072	1.069	1.066	1.063	1.060	1.057	1.054	1.051	1.048	1.045	1.042	1.039
1986	1.036	1.033	1.030	1.027	1.024	1.021	1.018	1.015	1.012	1.009	1.006	1.003
1987	1.000											
1988												
1989												

RATE ADJ. > 0.00%

REAL RATE MULTIPLIERS FEB. 1987

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1975	1.525	1.521	1.517	1.512	1.508	1.503	1.499	1.495	1.490	1.486	1.482	1.477
1976	1.473	1.469	1.465	1.460	1.456	1.452	1.448	1.443	1.439	1.435	1.431	1.427
1977	1.422	1.418	1.414	1.410	1.406	1.402	1.398	1.394	1.390	1.386	1.382	1.378
1978	1.374	1.370	1.366	1.362	1.358	1.354	1.350	1.346	1.342	1.338	1.334	1.330
1979	1.326	1.323	1.319	1.315	1.311	1.307	1.303	1.300	1.296	1.292	1.288	1.285
1980	1.281	1.277	1.273	1.270	1.266	1.262	1.259	1.255	1.251	1.248	1.244	1.241
1981	1.237	1.233	1.230	1.226	1.223	1.219	1.215	1.212	1.208	1.205	1.201	1.198
1982	1.194	1.191	1.187	1.184	1.181	1.177	1.174	1.170	1.167	1.164	1.160	1.157
1983	1.153	1.150	1.147	1.143	1.140	1.137	1.133	1.130	1.127	1.124	1.120	1.117
1984	1.114	1.111	1.107	1.104	1.101	1.098	1.094	1.091	1.088	1.085	1.082	1.079
1985	1.076	1.072	1.069	1.066	1.063	1.060	1.057	1.054	1.051	1.048	1.045	1.042
1986	1.039	1.036	1.033	1.030	1.027	1.024	1.021	1.018	1.015	1.012	1.009	1.006
1987	1.003	1.000										
1988												
1989												

Appendix G

UNIFORM JUDGMENT INTEREST ACT AND ANALYSIS

A. The Uniform Judgment Interest Act

PART I
General

1. In this Act,

(a) "interest rate" means the rate of interest published in *The Gazette* as required in section 3;

(b) "judgment" includes order of a court.

2. Her majesty is bound by this Act.

3. (1) The Lieutenant Governor in council may make regulations respecting the method of determining and the frequency of publishing interest rates and the periods with respect to which interest rates are in effect.

(2) The (*fill in the appropriate official*) shall determine and publish in *The Gazette* interest rates in accordance with the regulations.

PART II
Interest Before Judgment

4. In this Part, "pecuniary loss" does not include pain and suffering, physical inconvenience and discomfort, social discredit, injury to reputation, mental suffering, injury to feelings, loss of amenities and of expectation of life or loss of society of spouse or child.

5. (1) Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest on the judgment calculated in accordance with the Part.

(2) The court shall not award interest

(a) or that part of a judgment that represents pecuniary loss arising after the day of judgment and that is identified by the court;

(b) on interest awarded under this Part;

(c) on exemplary or punitive damages;

(d) on an award of costs in action;

(e) on money, and interest on that money, borrowed by a party in respect of damages described in section 6(2);

(f) on money that is paid into court and accepted in satisfaction of a claim;

(g) where the judgment is given on consent, unless agreed to by the parties;

(h) where there is an agreement between the parties respecting the interest; or

(i) where the payment of interest is otherwise provided by law.

(3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or any part of the amount for which judgment is given, refuse to award interest under this Part, or award interest under the Part at a rate or for a period or both other than a rate of period determined pursuant to section 6.

(4) In a jury trial, the judge shall exercise the powers of the court under this Part.

(5) In the case of a default judgment, the registrar of the court shall award interest calculated in accordance with this part, but shall not exercise any discretion granted to the court under subsection (3).

6. (1) Subject to subsections (2) and (3), the court shall calculate interest under this Part from the day on which loss or damage is first sustained to the day or judgment at the rate determined by averaging the interest rates in effect during that period.

(2) Where a judgment includes damages for expenses incurred or income lost, the court shall

(a) determine the total of those damages sustained within the three-month period commencing on the day on which loss or damage is first sustained and within each subsequent three-month period; and

(b) calculate interest from the last day of each three month period described in clause (a) to the day of judgment, on the total of the damages sustained within the three-month period, at the interest rate in effect on the last day of the three-month period.

(3) Where a party pays money into court in satisfaction of a claim and another party does not accept the payment and obtains a judgment for an amount less than or equal to the amount paid into court, the court shall award interest,

(a) from the day on which loss or damage is first sustained to the day of payment into court, calculated in accordance with this Part; and

(b) from the day of payment into court to the day of judgment, in an amount equal to the actual interest earned on the portion of the money paid into court that is equal to the amount of the judgment.

NOTE: Jurisdictions should review their Rules of Court to ensure that it is specified whether a judgment is inclusive or exclusive of interest in comparing the amount of the judgment awarded to the amount paid into the court for the purpose of determining costs.

7. For the purpose of enforcing a judgment, interest awarded under this Part is included in the judgment.

8. This part does not apply to a cause of action that arises before the coming into force of this Part.

PART III
Post-judgment Interest

9. Notwithstanding that the entry of judgment may have been suspended by any proceeding in an action, including an appeal, every judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied

(a) with respect to interest to be applied during the period from January 1 to June 30 in a year, at the interest rate in effect on January 1 of the year; and

(b) with respect to interest to be applied during the period from July 1 to December 31 in a year, at the interest rate in effect on July 1 of the year.

NOTE: This Part only deals with the determination of the past-judgment interest rate in the context of the situation of those jurisdictions that are subject to the *Interest Act* (Canada). Other issues, such as the extent of the definition of the term "judgment debt," coming into force and transitional application of the existing regime are dependent upon the precise terms of the Act amending the *Interest Act* (Canada).

B. Comparison: Uniform Act and Commission Recommendations

1. Introduction

Set out below is a comparison of the features of the Uniform *Judgment Interest Act* and the New Act contemplated by the Commission's recommendations.

2. General Discretion

(a) B.C.L.R.C.

No general discretion to deny interest. Recommendation No. 2.

(b) Uniform Act

Discretion to refuse "where just to do so." Section 5(3).

3. Fixing the Rate of Interest

(a) B.C.L.R.C.

Rate should be based on the prime rate and adjusted monthly. Recommendation 4.

(b) Uniform Act

The basis of rate and the frequency of its alternation is left to regulations. The *Uniform Act* provides no guidance as to the content of these regulations. Section 3.

4. Discretion to Vary the Interest Rate

(a) B.C.L.R.C.

No discretion except where a foreign interest rate is in issue. Recommendation 3.

(b) Uniform Act

Discretion to vary "where just to do so." Section 5(3).

5. Exclusions from Prejudgment Interest in General

(a) B.C.L.R.C.

See Recommendation 15(3).

(b) Uniform Act

See Section 5(2).

6. Prejudgment Interest on a Declaration

(a) B.C.L.R.C.

Yes: Recommendation 15(2).

(b) Uniform Act

Yes: Section 5(1).

7. Temporal Apportionment of Loss

(a) B.C.L.R.C.

Yes: Recommendation 7.

(b) Uniform Act

Yes: Section 5(2)(a). The B.C.L.R.C. recommendations are more detailed.

8. Prejudgment Interest on Costs

(a) B.C.L.R.C.

Yes, but on disbursements only. Recommendation 15(3)(d).

(b) Uniform Act

No: Section 5(2).

9. Time from which Interst Starts to Run: General

(a) B.C.L.R.C.

Runs from date cause of action accrues (Recommendation 6(1)) unless loss assessed with reference to a later date (Recommendation 6(2)).

(b) Uniform Act

Runs from day "loss or damage is first sustained." Section 6(1).

10. Allocation of Past Loss

(a) B.C.L.R.C.

Past pecuniary loss allocated to one month accural periods. Recommendations 9 and 10.

(b) Uniform Act

"Expenses incurred or income lost": allocated to three month accural periods. Section 6(2).

11. Fluctuation of Interest Rate

(a) B.C.L.R.C.

Rates allowed to fluctuate monthly. Accounting for the fluctuations is dealt with by the multiplier scheme.

(b) Uniform Act

(i) In general, the interest rates in force during the prejudgment period are averaged. Section 6(1).

(ii) Interest on "expenses incurred and income lost" is held to a constant rate — that in force at the end of the three-month accrual period.

12. Special Interest Rate for Non-pecuniary Loss

(a) B.C.L.R.C.

Interest on nonpecuniary loss would run at the "real rate" (3½%). Recommendation 14.

(b) Uniform Act

No special provision is made.

13. Compound Interest

(a) B.C.L.R.C.

Judgment interest should be compounded. Recommendation 5(2).

(b) Uniform Act

Interest cannot be compounded since interest on interest is prohibited by section 5(2)(b).

14. Respective Roles of Judge and Jury

(a) B.C.L.R.C.

See the rules provided in Recommendation 11.

(b) Uniform Act

Less specific guidance is given by the Act in section 5(4).

15. Presumptions and Discretion re Apportionment and Allocation

(a) B.C.L.R.C.

Appropriate presumptions are set out in Recommendation 12 and a residual discretion is provided in Recommendation 13.

(b) Uniform Act

Presumptions are not addressed in the Act. The discretion in section 5(3) *may* be of assistance.

16. Acceptance of Tender before Judgment

(a) B.C.L.R.C.

The plaintiff would be entitled to claim prejudgment interest. Recommendation 18.

(b) Uniform Act

No claim for interest. Section 5(1): "Where a person obtains a judgment . . ."

17. Accounting for Interim Payments

(a) B.C.L.R.C.

The way in which interim payments are to be dealt with are described in Recommendations 32, 36 and 37.

(b) Uniform Act

The Act provides no guidance on this issue.

18. Post-judgment Interest

The provisions of the *Uniform Act* concerning post-judgment interest are rudimentary.

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